

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

183

APPENDIX (APPELLANT)

RECEIVED

DEC 9 1970

CLERK OF THE UNITED
STATES COURT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
for the District of Columbia Circuit

No. 24,572

FILED DEC 9 1970

Nathan J. Paulson
CLERK

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Arthur S. Curtis

816 National Press Building
Washington, D.C. 20004

Attorney for Appellants

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United States District Court for the District of Columbia

Arthur S. Curtis
Plaintiff.
vs.
Peete, Cone and Beiding
Defendant.

CIVIL No. 3529-55

NOTICE OF APPEAL

Notice is hereby given this 14th day of June, 1970 that

Arthur S. Curtis, the plaintiff shown above,

hereby appeals to the United States Court of Appeals for the District of Columbia from the
~~Order of Judge Curran, C.J., denying the Motion of plaintiff to~~
~~judgment of this Court entered on the~~
~~XX~~
~~in favor of~~
~~XXXXXXXX~~
~~or alternatively send the case to New York on a Change of Venue,~~
~~against said~~
~~XXXXXXXX~~
 dated June 26 1970, the Orders of Judge Pratt dated 5-19-1970
 denying the Motion for Rehearing, and May 26, 1970 denying Plaintiff's
 Motion for a change of venue and granting Defendant's Motion to
 Dismiss; and the denial at the
 hearing before Judge Pratt, requesting that he disqualify himself
 from further hearing of the case.

Attorney for
 XXXXXXXX

Arthur S. Curtis
 Arthur S. Curtis, counsel
 for Plaintiff
 816 National Press Bldg
 Washington, D.C.

(Filed July 14, 1970)

United States District Court for the District of Columbia

2.

DATE		PROCEEDINGS
1955		Deposit for cost by
Aug.	9	Complaint, appearance
"	9	Summons, copies (1) and copies (1) of Complaint issued Unable to contact 8-30-55
Dec	21	Summons, copy and copy of complaint issued. N.F. 10/12/55; file
Dec	5	Summons, copy & copy of complt issued; served 12/8/55; file
Mar.	8	Motion of pltf. for default judgment; c/m 3-7-56. ---12-23-56 "
"	26	Cause dismissed under Rule 13, as of 9/8/56 (N) (Clerk)
Oct.	2	Motion of pltf. to reinstate cause. c/m 10-1-56. file
Oct.	19	Order dismissing motion to reinstate for want of prosecution. (N)
		Matthews,
Oct.	22	Motion of pltf. to reinstate; c/m 10-20-56; N.C. 22-56. filed.
Nov.	9	Order reinstating cause. (N) Matthews, J.
Feb	14	Appearance of Carl L. Shipley as counsel for pltf. withdrawn. (Fiat)
		(N)McG
Apr.	2	Change of address of Pltff to 816 Natl. Press Bldg.
Apr.	2	Summons, copy (1) & copy of complaint issued
Sept	3	First notice under Rule 13
Jan.	9	Summons, copy & copy of complaint issued. N.F. 10-1-57 file
Mar	1	First notice under Rule 13
Mar	24	Summons, copy & copy of complt issued. N.F. 4-15-58
May	5	Summons, copy & copy of complt. issued. N.C. 5-27-58
Oct	27	First notice under Rule 13
Nov	12	Summons, copy & copy of complaint issued N.F. 12-3-58
June	16	Cause dismissed under Rule 13, as of 6/3/59 (N) (By Clerk)
Jun.	17	Motion of pltf. to re-instate case on calendar. N.C. 6-18 59. filed.
Jun.	18	Certificate of service. filed.
Sep.	10	Order reinstating cause on calendar. (N) Holtzoff, J.
Oct	10	First notice under Rule 13
Mar.	4	Summons copy and copy of complaint issued. N.F. 3-25-60
Aug	25	First notice under Rule 13
"	6	Summons, Copy & Copy of Complt. issued. NF 9/27/60
"	20	Summons, Copy & Copy of complt. issued. N.F. 3-14-61.
"	14	First notice under Rule 13
"	25	Summons, copy & copy of complt issued; NF 9-15-61
62		
Feb	15	First notice under Rule 13
Feb	28	Summons, copy and copy of complaint issued N.F. 3/21/62
Aug	29	Summons, copy & copy of complaint issued NF 9-19-62

United States District Court for the District of Columbia

3.

Furtis

vs.

Foote, Cone &

Belding, a corp.

C. A. No.

3529-55

Supplemental Page

PROCEEDINGS

19	First notice under Rule 13	
28	Summons, copy and copy of complaint issued.	N.F. 3-21-63
1	Case dismissed under Rule 13, as of 9-21-63 (N)	(By Clerk)
4	Motion of pltf to reinstate; P&A.	filed
7	Order reinstating case. (N)	Holtzoff, J.
9	Summons, copy and copy of complaint issued.	N.F. 10-30-63.
10	Summons, copy and copy of complaint issued.	N.F. 3-31-64
4	Summons, copy and copy of complaint issued	N.F. 8-25-64
31	Summons, copy and copy of complaint issued.	N.F. 1/4/65
25	Summons, copy and copy of complaint.	N.F. 5/28/65.
28	First notice under Rule 13.	
5	Summons (1) copy (1) and copy (1) of complaint.	N.F. 12/8/65.
14	Summons, copy (1) and copy of complaint.	N.F. 4/25/66.
2	Summons, copy (1) and copy of complaint issued.	N.F. 9/6/66
27	Summons, copy (1) and copy (1) of complaint issued	N.F. 3-21.
8	Summons, copy and copy of complaint issued.	NF 8/21/67
22	First Notice Under Rule 13	
26	Summons, copy and copy of complaint issued.	N.F. 1-20
1	First Notice under Rule 13	
2	Summons, copy and copy of complaint issued.	N.F. 7-22
3	First Notice Under Rule 13	
6	Summons copy 1 and copy 1 of complaint issued.	N.F. 1-6
9	First notice under Rule 13	
2	Summons, copy (1) and copy (1) of complaint issued.	N.F. 6-16
9	Order to show cause returnable Oct. 15, 1969 at 4:00 p.m. in Courtroom No. 3, U.S. Courthouse, why case should not be dismissed.	Jones, J. N.
6	Called, if service on deft. is not perfected by Dec. 31, 1969, case to be dismissed without prejudice by Clerk on Dec. 31, 1969. (Rep: P. Brockmeyer)	Jones, J.
	(see over)	

United States District Court for the District of Columbia 4.

CURTIS vs. **FOOTE, CONE, etc.** C. A. No. **3529-55** Supplemental P.

DATE	PROCEEDINGS
20	Cause to be dismissed without prejudice by clerk if service of order to show cause is not perfected by Dec. 31, 1969. (N) Jones, J.
17	Motion to amend complaint heard and Denied. Curran, J.
17	Motion to appt. process server heard and granted. Curran, J.
18	Affidavit of Arthur Curtis in support of attachment before judgment. Bond approved in sum of \$10,00.00. (flat) Matthews, J.
18	Bond in attachment before judgement in sum of \$10,000.00 with National Surety Corporation approved. filed
18	Attachment, Writs (4) & interrog (4) issued to Sears Roebuck and Co; deposit by Curt
18	Attachment, writs (4) & interrog (4) issued to Merrill, Lynch, etc. / Served 12-18. ser. 12-22
19	Summons, copy (1) and copy (1) of complaint issued. deft. ser 12-2
30	Motion of pltf. to transfer to U.S. Dist. Ct. for Southern Dist. of N. Y.; P&A; Exhibits (5); M. C. filed
9	Motion of deft. for enlargement of time; P&A; c/m 1-9-70. filed
13	Opposition of pltf. to motion for extension of time; c/m 1-12--70; exhibit. filed
13	Request of pltf. for admissions; c/m 1-12-70; exhibit. filed
14	Order granting deft. to and including Feb. 11, 1970 to answer or file motions. (N) McGuire, J.
21	Motion of deft. to dismiss; exhibit A; P & A; c/m 1-21; filed
21	Motion of deft. for enlargement of time to respond to motion for change of venue; P & A; c/m 1-21; M.C. filed
21	Motion of deft. for enlargement of time to respond to request for admissions; P & A; c/m 1-21; M.C. filed
22	Motion of pltf. for judgment by default; P & A; exhibits 1 thru 4; c/m 1-20; M.C. filed
23	Motion of deft. for enlargement of time to respond to motion for judgment by default; P & A; c/m 1-23; M.C. filed
26	Opposition of pltf. to motion to dismiss; statement; c/m 1-24-70. filed
26	Opposition of pltf. to various motions filed by deft. c/m 1-24-70. filed
26	Motion of pltf. for further consideration of order granting thirty additional days to deft. to respond; P&A; c/m 1-24-70; M.C. filed

United States District Court for the District of Columbia 5

vs. FOOTE, CONE & BELDING C. A. No. 3529-55 Supplemental Page

PROCEEDINGS

- | | | |
|----|--|------------------------|
| 10 | Appearance of Blake T. Franklin as attorney for deft; c/m 2-10. filed | |
| 16 | Motion of Deft, to dismiss with Prejudice; P&A; exhibit A & B; c/m 2-16-70; M.C. | filed |
| 16 | Motion of Deft. for enlargement of time to respond; P&A; c/m 2-16-70; M.C. | filed |
| 25 | Objections of pltf. to recommendation of pretrial examiner; c/m 2-21-70; M. C. | filed |
| 25 | Objections of pltf. to motion for enlargment of time to respond to motion requesting further consideration; c/m 2-21-70. | filed |
| 25 | Objections of pltf. to motion to dismiss; P&A; statment; exhibits (8); c/m 2-23-70. | filed |
| 20 | Recommendation allowing defts motion for enlargement of time to respond to recuest for admissions; extended to April 1, 1970. | AC/N Pretrial Examiner |
| 20 | Recommendation allowing plaintiff's motion for enlargement to time to respond to motion for judgment by default; extended to April 1, 1970. | AC/N Pretrial Examiner |
| 20 | Recommendation allowing deft's motion for enlargment of tire to respond to motion for change of venue; extending to April 1, 1970. | AC/N Pretrial Examiner |
| 27 | Opposition of deft. to objections to recommendation of pretrial examiner; c/m 2-27. | filed |
| 4 | Response of Sears, Roebuck and Co., garnishee, to interrogatories; c/m 3-4. | filed |
| 31 | Objections of deft. to request for admissions of fact; c/m 3-31; M.C. | filed |
| 31 | Points & Authorities of deft. in opposition to motion for default judgment; c/m 3-31. | filed |
| 31 | Response of deft. to request for admissions; affidavit; c/m 3-31. | filed |
| 31 | Points & Authorities of deft. in opposition to motion for a change of venue; c/m 3-31. | filed |
| 6 | Transcript of proceedings, March 18, 1970, pp. 1-12; (Court reporter: Joan Curtis Blair, Court's copy.) | filed |
| 11 | Motion of pltf. for change of venue, argued and denied (Order to be presented): motion of deft. to dismiss argued and granted with prejudice (Order to be presented.) Pratt, J. | Se |

6.

_____ vs. _____ C. A. No. _____ Supplemental Page _____

PROCEEDINGS	
10	Motion of pltf. for rehearing; c/m 5-14; M.C. filed
19	Motion for rehearing denied. (Flat) (N) Pratt, J.
21	Points & Authorities of deft. in opposition to motion for rehearing; c/m 5-21. filed
22	Suggestion of death of Helen Fitzgerald, deft., by pltf. ERROR
22	Objection of pltf. to order presented by defts; c/m 5-22; M.C. filed
22	Motion of pltf. to remove Judge Pratt from case; P&A; notice; affidavit; c/s 5-22; M.C. filed
26	Order granting deft's motion to dismiss with prejudice pursuant to Federal Rule 41 (b) (signed 5-25-70) (N) Pratt, J.
26	Order denying pltf's motion for change of venue. (N) (signed 5-25-70) Pratt, J.
27	Transcript of proceedings, May 14, 1970, pages 1-3A (Reporter: Katherine K. Byrholdt, Court's copy.) ⁺ filed
1	Hearing on motion to disqualify Judge heard and taken under advisement. Curran, C.J.
26	Order denying pltf's motion to remove Judge Pratt from this case, to send the case to Judge Waddy and to send the case to New York. C/S 2/25/70 filed
14	Notice of appeal of pltf from order of 6-26-70; deposit \$5.00 by Curtis; copy mailed to Milo Cooper. filed
14	Cost bond on appeal of pltf in the sum of \$250.00 with National Surety Corp. filed
21	Record on Appeal delivered to USCA; Deposot by Arthur S. Curtis \$2.30.
21	Receipt From USCA for original record, filed

TABULAR STATE

Appendix p. 7

IN PROPORTION AREA

SEPTEMBER 1961

STATE	POPULATION	PERCENTAGE
Ala.	2,015,000	1.2%
Ark.	1,192,000	0.7%
Cal.	15,717,000	9.5%
Col.	2,645,000	1.6%
Conn.	2,080,000	1.3%
Del.	242,000	0.1%
Fla.	4,588,000	2.8%
Ga.	3,677,000	2.3%
Id.	1,044,000	0.6%
Ill.	11,433,000	7.0%
Ind.	4,625,000	2.8%
Iowa.	2,812,000	1.7%
Kan.	2,333,000	1.4%
Kent.	1,928,000	1.2%
La.	3,049,000	1.9%
Maine.	588,000	0.4%
Maryl.	2,789,000	1.7%
Mass.	2,565,000	1.6%
Mich.	7,314,000	4.5%
Minn.	3,286,000	2.0%
Miss.	2,566,000	1.6%
Mont.	939,000	0.6%
Nebr.	1,578,000	1.0%
Nev.	206,000	0.1%
N.H.	326,000	0.2%
N.J.	7,821,000	4.8%
N.M.	1,293,000	0.8%
N.Y.	19,045,000	11.7%
Ohio.	5,053,000	3.1%
Ore.	1,119,000	0.7%
Penn.	11,280,000	6.9%
R.I.	266,000	0.2%
S.C.	2,067,000	1.3%
S.D.	786,000	0.5%
Tenn.	3,039,000	1.9%
Texas.	11,191,000	6.9%
Vt.	244,000	0.1%
Wash.	2,769,000	1.7%
Wisc.	5,283,000	3.2%
W.Va.	1,853,000	1.1%
Wyom.	266,000	0.2%

THESE FIGURES ARE
BASED ON THE 1960 CENSUS
AND ARE SUBJECT TO REVISION

FOR MORE INFORMATION
SEE PAGE 1
FOR THE GOAL OF THE PROGRAM
SEE PAGE 2
FOR IMPORTANT INFORMATION
SEE PAGES 3 TO 5

FOOTE, CONE & BELDING
Advertising

247 PARK AVENUE NEW YORK 17

Appendix 9.

October 24, 1946

Mr. Arthur S. Curtis
Curtis Features Syndicate
Box #223
Benjamin Franklin Station
Washington, D. C.

Dear Mr. Curtis:

Thank you for submitting the MEDAL OF HONOR strip idea
for our consideration.

We have examined it very carefully and considered accounts
on which it might possibly be used but, regretfully, have
come to the conclusion that it doesn't fit into any of our
current plans.

Thank you for your courtesy in bringing this to our atten-
tion.

Sincerely yours,


Vice President

William E. Berchtold
BT
enc.

NOTICE OF MOTION

This is to inform you that on June 1, 1970, at 9:30 a.m. or as soon thereafter as the case may be heard, by Chief Judge Curran, the Plaintiff will move Chief Judge Curran of the United States District Court to grant the relief requested in the attached Motion.

FROM:

Arthur S. Curtis,
816 National Press Building,
Washington, DC 20004,
NA 8 -- 5696,
Counsel for Plaintiff.

CERTIFICATE OF SERVICE

I have this May 22, 1970, personally delivered a copy of this Notice of Motion and the attached papers to the office of Milo Coerper, shown above.

1

Arthur S. Curtis

11.
MOTION TO REMOVE JUDGE PRATT FROM THIS CASE BECAUSE OF BIAS
AND FOR OTHER REASONS, TO SEND THE CASE BACK TO JUDGE WADDY,
TO REQUEST THAT THE CHIEF JUDGE GRANT THE MOTION TO SEND THE
CASE TO NEW YORK ON A CHANGE OF VENUE UNDER 28 USC 1404 (A),
AND FOR SUCH OTHER RELIEF AS THE COURT DEEMS PROPER.

The Plaintiff in this case respectfully moves this Court
to remove Judge Pratt from this case, and either to send the
case to New York under the pending Motion for a change of
venue in accordance with 28 USC 1404 (A), or else to reassign
the case to Judge Waddy (who stated at the hearing before him
on March 18, 1970, that he would retain jurisdiction and that
the case would be sent by him to New York in accordance with
Plaintiff's Motion for a change of venue under 28 USC 1404
(A)).

In support of this Motion, Plaintiff submits the following
affidavit of bias and the following points and authorities.

Counsel respectfully calls attention to Canon 15, which
requires him to go forward without fear of judicial disfavor
where the case requires it.

Arthur S. Curtis
816 National Press Building
Washington, DC 20004
NA 8 - 5696
Counsel for Plaintiff

The Plaintiff objects to the order presented by opposing counsel for the following reasons:

1. The form of the order is prejudicial to the appellate rights of the Plaintiff, as will be brought out in the hearing to settle the Order;
2. The Order is not based upon the record of the hearing, and Plaintiff has ordered a transcript and as soon as it is ready it will be available to this Court in settling the Order;
3. There is pending in this Court a Motion to Remove Judge Pratt from this case and for other relief, on grounds of prejudice, and the better practise would be to withhold hearings until there is a ruling whether the case was ever properly before the Court when it was sent to Judge Pratt, and whether he should have continued to hear the matter after the Motion to request him to remove himself was made;
4. And for such other reasons as are proper.

Respectfully submitted,

Arthur S. Curtis
Arthur S. Curtis, counsel for Plaintiff
816 National Press Bldg.
Washington, D.C. Na8-5696

Certificate of Service:

I have this 22 May 1970 mailed postage prepaid a copy of the above Objections to Milo Coerper, One Farragut Square, NW, Washington, D.C. 20004

Arthur S. Curtis
Arthur S. Curtis

Plaintiff respectfully requests a rehearing on the Motion to Dismiss for the reason that the Court overlooked the pleadings, which show that the Defendant made a General Appearance when Defendant responded for the Motion for Judgment by Default. The Court did not mention these pleading and the appearance in the Court's opinion, which clearly shows that the Court overlooked this phase of the case. If the Court recognizes that there was a general appearance, as the papers clearly show on their face, Then plaintiff has clearly succeeded in gaining jurisdiction over the person of defendant.

Further, if in the Court's opinion Defendant is not personally before the Court, then Plaintiff is entitled to a Judgment of Condemnation in the sum of \$5,000. for the property attached before judgment, and Plaintiff so prays for this relief.

The Court has been too much concerned over the age of the case and not enough with the fact that justice was finally at hand for the plaintiff. The public pays for the Courts in order to ensure that everyone shall have his day in Court, and each person has a constitutional right to a fair hearing.

The Court erred in failing to disqualify itself from further hearing, and it is respectfully recommended that it should vacate its rulings and refer the case back to Judge Waddy.

"Defendant made an appearance when he made his motion to dismiss," Huber v Bissell, 39 F.R.D. 346, D.C. Pa. 1965. Action requesting extension of time is a general appearance, Pacific Lanes, Inc. v. Bowling Proprietors Ass'n of America, 248 F. Supp. 347.; "An appearance is ordinarily an overt act by which a party comes into court and submits himself to its jurisdiction; it is an affirmative act requiring knowledge of the suit and intention to appear." Anderson v Taylorcraft, Inc. 197 F. Supp 882, D.C. Pa 1961.

Judge Jones in his Order of 1969 gave Plaintiff until the end of 1969 to perfect service on Defendant. By this can be meant only, gaining jurisdiction of the Court over the Defendant.

Defendant applied for several continuances in the form of motions requesting time to answer at a later date several pleadings which were filed. 5 Am Jur 2d, at p.498 reads, "Ordinarily, a motion for a continuance is considered a step in the regular prosecution of the cause, and therefore a general appearance," citing 24 ALR 2d 380, Anno. 102 ALR 225. So, too, "The general rule is that a defendant who appears and in the first instance in the cause moves for an extension of time to plead is deemed to have made a general appearance," Ibid, p. 499, ANNO 81 ALR 166. "A defendant who appears to contest or resist a motion made by the plaintiff is deemed to have made a general appearance so as to subject himself to the jurisdiction of the court, Ibid, p.506, citing Boyd v Wyly, 124 US 98, 31 L ed 399, and other cases in Fn.4. A general appearance is ordinarily effected by the making of any motion that involves the merits of the plaintiff's claim, or any motion based wholly or in part on nonjurisdictional grounds, Ibid, p.496, Anno. 111 ALR 925 et seq. The general rule that where a defendant seeking to question the jurisdiction of the court over him asks for relief in addition to vacation of service, he thereby submits himself to the jurisdiction of the court, Ibid 497. In *Reverie Lingerie Inc. v McCain*, 258 NC 353, 128 S.E. 887, the Court held that where a party raised the statute of limitations in a pleading which also questioned the jurisdiction of the court over his person, he made a general appearance.

A review of the file in the case shows clearly that the Defendant has in fact made an appearance and submitted to the jurisdiction of this Court. It filed objections to FRCP 36 Request for Admissions, and later filed purported Answers. It filed an Objection to the granting of a Judgment by Default, and with it filed Affidavits. It requested continuances. It filed motions to dismiss both with and without prejudice. It filed objections to a motion for a change of venue. In doing these things, the Defendant placed itself under the jurisdiction of the Court and in fact accomplished what Judge Jones intended that Curtis must do, namely, obtain jurisdiction over the Defendant. Thus the Plaintiff succeeded in fulfilling the terms of the Order as set forth by Judge Jones, and having done this, his case should not be dismissed.

II. The Court should recall its
Orders and send the case back either
to Judge Waddy, or to Judge Jones.

The Court appeared puzzled by the words in Judge Jones' Order. Since Judge Jones is still with us, the proper tribunal to determine whether the Order is enforced is Judge Jones.

Moreover, the transcript at the Hearing before Judge Waddy shows that he specifically stated both that he retained control over the case and that he would send it to New York under 28 USC 1404(a). Somehow the case then left his hands and came to be heard by another Judge who did not even see the Transcript, altho Plaintiff paid \$19.50 to write it up and preserve it for the Court.

It would be a strange situation indeed where one judge held that the case should be sent to New York and another on the same Court held contrary, since that would mean that by shopping for judges a party could turn the case one way or another.

It is respectfully requested that this Court consider the matters above, reconsider its Orders, and in the interest of convenience of the parties, witnesses, and justice take the action requested above.

Respectfully,

Arthur S. Curtis, Counsel for Pl.
816 National Press Bldg. D.C. 20004

Certificate: I have this
14th May 1970 mail & postage prepaid
a copy of this pleading to Milo Coerper,
One ~~XXXX~~ Farragut Square, D.C.

A.S.Curtis

vs.

RESPONSE TO REQUEST
FOR ADMISSIONS

FOOTE, CONE, AND BELDING, INC., :
Defendant. :

FOOTE, CONE, AND BELDING, INC., defendant, makes the following statement in response to the request for admissions served upon it by mail by plaintiff on January 12, 1970, the time of defendant to respond having been enlarged by the court until April 1, 1970.

Request Number 2 - It denies the truth in the matter set forth in request number 2.

Request Number 4 - It cannot truthfully admit or deny the matter set forth in request number 4 for the reason that said matter is not within its knowledge.

Request Number 5 - It denies the truth in the matter set forth in request number 5.

Request Number 7 - It cannot truthfully admit or deny the matter set forth in request number 7 for the reason that said matter is not within its knowledge.

Request Number 8 - It denies the truth in the matter set forth in request number 8.

Request Number 11 - It cannot truthfully admit or deny the matter set forth in request number 11 for the reason that Fairfax Cone has no present recollection as to whether or how he was informed that service had been made personally upon one William McAdams in approximately 1955.

Request Number 12 - It denies the truth in the matter¹⁸
set forth in request number 12.

Request Number 13 - It denies the truth in the matter
set forth in request number 13.

Request Number 15 - It cannot truthfully admit or
deny the matter set forth in request number 15 for the reason
that said matter is not within its knowledge.

Request Number 16 - It cannot truthfully admit or
deny the matter set forth in request number 16 for the reason
that said matter is not within its knowledge.

Request Number 17 - It cannot truthfully admit or
deny the matter set forth in request number 17 for the reason
that said matter is not within its knowledge.

Request Number 19 - Objected to.

Request Number 20 - It denies the truth in the matter
set forth in request number 20.

Request Number 21 - It denies the truth in the matter
set forth in request number 21.

Request Number 22 - It denies the truth in the matter
set forth in request number 22.

Request Number 24 - It denies the truth in the matter
set forth in request number 24.

DATED: March 31, 1970

FOOTE, CONE, & BELDING, INC.

By

Richard Balian
Vice President

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,

Plaintiff

vs.

FOOTE, CONE, AND BELDING, INC.,

Defendant.

CIVIL ACTION NO. 3529-55

OBJECTIONS TO PLAINTIFF'S
REQUEST FOR ADMISSION
OF FACTS

Defendant objects to request number 19 of plaintiff's request for admission of facts, calling for admission: "that the Defendant was sued for wrongfully using the Smokey the Bear idea, theme, or program, by one who allegedly originated same, and that judgment was rendered against the Defendant in that suite [sic]", on the grounds that said request calls for admission as to immaterial and irrelevant matter, and that the item objected to herein will throw no light on the essential issues of this law suit.

Milo G. Coerper
Attorney for Defendant
One Farragut Square South
Washington, D.C. 20006

20.

OBJECTIONS TO
DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE
PURSUANT TO FEDERAL RULE 41(b) AND/OR THE INHERENT
POWER OF THIS COURT

Comes now the Plaintiff, ARTHUR S. CURTIS, by Counsel and opposes Defendant's motion to dismiss, and gives as reason that the Defendant has not been prejudiced by the delay in bringing the Case to trial, but in fact has received a benefit of additional time to prepare its defenses, since it has known since 1955 that the Case was pending in this Court, as is shown by the attached copies of correspondence with Defendant and its agents.

Further, Defendant's motion seeks to overturn the ruling by Judge Jones in this Case which this Court should not do because there is no valid basis for departing from the rule of the Law of the Case.

Arthur S. Curtis
816 National Press Building
Washington, D. C. 20004
(Telephone: NA8-5696)

Attorney for Plaintiff

FOOTE, CONE & BELDING
Advertising

247 PARK AVENUE • NEW YORK 17

August 10, 1954

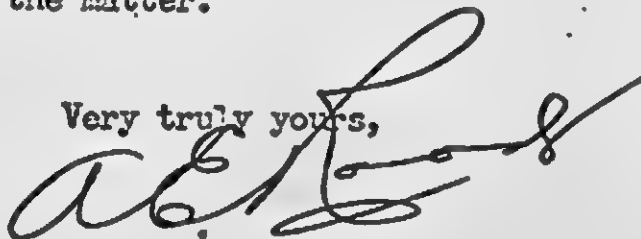
Mr. Carl L. Shipley
National Press Building
Washington 4, D.C.

Dear Mr. Shipley:

This will acknowledge your June 10 letter telling us that you represent Mr. A. S. Curtis, who you assert is the owner and originator of a literary idea involving pictorial representation and narrative account of valorous deeds performed by Medal of Honor winners.

While we do not concede in any way that the advertisement in question infringes upon your client's rights, we would like to call to your attention the fact that this advertisement was prepared by us for the U.S. Treasury Department on a purely voluntary basis as a public service and without compensation. If Mr. Curtis is aware of the circumstances, we are quite sure he will not wish to press the matter.

Very truly yours,



A. E. Rood,
Vice President, Finance

FOOTE, CONE & BELDING
Advertising

155 EAST SUPERIOR STREET - CHICAGO 11

June 1, 1955

711-14th NW
WDL

Room 622
Christian Reby

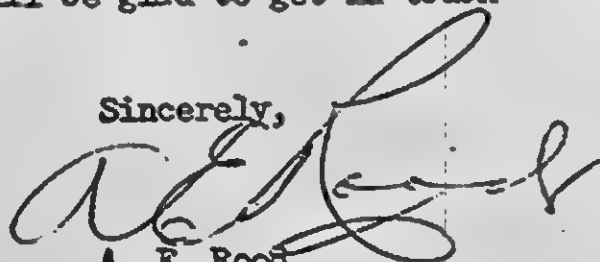
Mr. Carl L. Shipley
National Press Building
Washington 4, D.C.

— Dear Mr. Shipley:

This will acknowledge receipt of your letter of May 17 in regard to the claim of Mr. A. S. Curtis.

All I can tell you at this time is that the matter is under investigation. As soon as anything develops, I shall be glad to get in touch with you.

Sincerely,



A. E. Rood
Vice President, Finance

AER:om

SEABOARD SURETY COMPANY

HOME OFFICE

100 WILLIAM STREET, NEW YORK 38, N.Y.

June 8, 1955

Carl L. Shipley, Esq.
National Press Building
Washington 4, D. C.

RE: 00492 - A. S. CURTIS v. FOOTE, CONE & BELDING

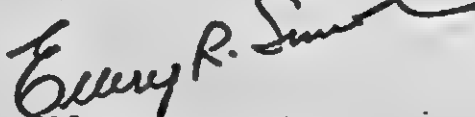
Dear Sir:

The correspondence pertaining to the claim of your client, Mr. A. S. Curtis, and relating to an advertisement prepared by Foote, Cone & Belding to promote the sale of United States Defense Bonds which appeared in Time Magazine on November 2, 1953, has been referred to this office for attention. In order that we may give consideration to the claim, it is requested that you furnish to us a copy or copies of the copyrighted material, that you advise us of the date such copyright was obtained, and that you also let us have the names of the publications in which the said material has been published together with the dates of such publication.

It also would be advisable, of course, for you to furnish me with any additional information which you believe will assist me in determining whether your client's claim is well founded.

Frankly, it was rather surprising to me that Mr. Curtis insists upon going forward with this claim in view of the fact that the alleged infringing advertisement was prepared as a public service without profit to anyone involved.

Very truly yours,


Ellery R. Smith,
Attorney

ERS:ap

24.
SEABOARD SURETY COMPANY

HOME OFFICE

100 WILLIAM STREET, NEW YORK 38, N.Y.

August 1, 1955

Carl L. Shipley, Esq.
National Press Bldg.
Washington 4, D. C.

RE: A. S. CURTIS v. FOOTE, CONE & BELDING
"MEDAL OF HONOR"

Dear Mr. Shipley:

We acknowledge receipt of your recent letter, together with enclosures, relating to the claim of your client, A. S. Curtis, involving a Defense Bond advertisement prepared by Foote, Cone & Belding and published in the November 2, 1953 issue of Time Magazine.

Frankly, I cannot see how the advertisement in question in any way infringes upon any copyright held by your client on his "Medal of Honor" cartoon strips. Certainly your client has not acquired any monopoly in the Medal of Honor winners nor any property rights in their feats. The latter are matters of official record and many of them have been the subject of various newspaper accounts and published articles.

Under the circumstances, we must respectfully deny liability, in behalf of our insureds, in respect of the advertisement in question or any similar material which they may have used or may hereafter use. It must be understood that our specification of a basis for denial of liability is without waiver of any other defenses which may be available.

Very truly yours,

Ellery R. Smith
Ellery R. Smith,

ERS:ap

cc: Frank & DuBois, Inc., 25 Broad St., New York 4, N. Y.

FOOTE, CONE & BELDING

247 Park Avenue · New York 17

ROBERT F. CARNEY
CHAIRMAN OF THE BOARD

February 25, 1957

Mr. A. S. Curtis
A. S. Curtis Features Syndicate
Box 223 Ben Franklin Station
Washington 4, D. C.

Dear Mr. Curtis:

I have your note of February 20th.

Normally, I would be quite happy to discuss with you any controversy we might be involved in but, inasmuch as some months ago this matter was placed in the hands of our lawyers, I do not feel that it would be appropriate for us to enter into any discussion. Of course, Mr. Taylor is in the same position as I am.

Quite apart from these considerations, I will be out of the city for about two weeks, and Mr. Taylor will be away for approximately a week. I would suggest, as my secretary has done when you spoke to her on the telephone last week, that you discuss the whole matter with our lawyers, Messrs. Solinger and Gordon.

Very truly yours,

Robert F. Carney

A. S. CURTIS FEATURES SYNDICATE
BOX 221, BEN FRANKLIN STATION
WASHINGTON 4, D. C.

February 23, 1957

Mr. David Sollinger
250 Park Avenue
New York, N. Y.

Dear Mr. Sollinger:

Mr. Bob Carney suggests that I contact you with reference to a possible settlement in the enclosed case. The enclosed complaint should tell you what the case is all about and indicate the value of a settlement to both parties. We are reasonable people here and regard litigation as a last resort.

I shall telephone you from Washington this week.

Most respectfully yours,

A. S. Curtis

235 EAST 45TH STREET
NEW YORK 17, N.Y.



ALL COMMUNICATIONS MUST BE
ADDRESSED TO KING FEATURES SYNDICATE

OFFICE OF
THE GENERAL MANAGER

June 8, 1948

Mr. Arthur S. Curtis
A.S. Curtis Features Syndicate
601 Bromo Seltzer Bldg.
Baltimore, Md.

Dear Mr. Curtis:

Mr. Hearst sent me your series about the air heroes and your letter. As you know, King Features produces or buys most of the feature material in the Hearst newspapers.

I would like to know whether the Medal of Honor series is available in all Hearst cities and what the price would be. I would then take up the matter again with Mr. Hearst.

Will you be kind enough to inform me?

Sincerely yours,

A handwritten signature in cursive script, appearing to read 'Ward Greene', written over a horizontal line.

Ward Greene

WG:MB

**DEFENDANT'S MOTION TO DISMISS WITH PREJUDICE
PURSUANT TO FEDERAL RULE 41(b) AND/OR THE INHERENT
POWER OF THIS COURT**

Comes now the Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., and moves the Court to dismiss this action on the grounds that Defendant has been severely prejudiced by Plaintiff's total lack of diligence in prosecuting this action in this jurisdiction or any other jurisdiction for over fourteen and a half (14-1/2) years, since the Complaint was filed, and over sixteen (16) years since the alleged cause of action apparently arose.

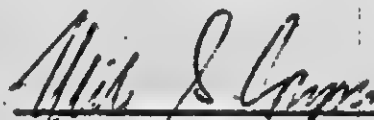
OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017

and

One Farragut Square South
Washington, D. C. 20006



Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLUMBIAARTHUR S. CURTIS,
Plaintiff

VERSUS

C.A. 3529-55

FOOTE, CONE AND BELDING
DefendantOPPOSITION TO
MOTION TO DISMISS

The plaintiff ^{pc}opposed the Motion to Dismiss filed by the Defendant for the reasons that 1) Defendant is inaccurate in stating to this Court that Plaintiff has not perfected Service, and 2) the posture of the case is such that a Motion for Judgment by Default in favor of the Plaintiff and against the Defendant is in order. Further, there are questions outstanding which if properly answered under oath by the Defendant, will show that the Motion to Dismiss cannot be granted; and for other reasons that are more fully brought out in the attached Points and Authorities, one of which is that the Motion to Dismiss was filed after Plaintiff's Motion for Judgment by Default under FRCP #54.

Respectfully,

Arthur S. Curtis, Attorney
816 National Press Bldg.
Washington, D.C. 20004 Na8-5696

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS
PLAINTIFF

VERSUS

C.A. 3529 - 55

FOOTE, CONE AND BELDING
Defendant

MOTION REQUESTING FURTHER
CONSIDERATION OF ORDER
GRANTING THIRTY ADDITIONAL
DAYS TO DEFENDANT TO RESPOND,
AND REQUESTING THAT THE COURT
NOW TAKE A LOOK AT THE WHOLE CASE

Plaintiff respectfully moves this Court to reconsider its Order, signed by Senior Judge McGuire, granting to the Defendant 30 additional days to respond. The reason for this request is that there has become available as evidence for the first time an affidavit by one William McAdams, which affidavit has been filed in this case, which states under oath that he was personally served in 1955 at a time when he was in fact doing business as the responsible representative of the Defendant. The Defendant at that time was doing business here, as is shown in the Motion for Judgment by Default which has been filed under FRCP 54(c), this past week.

Therefore, plaintiff respectfully requests that this Court now take a look at the case as a whole, including the Motion for Judgment by Default, and after oral arguments make its next ruling.

Respectfully,

Arthur S. Curtis, Attorney for
Plaintiff 816 National Press

Plaintiff opposes various Motions filed by the Defendant
in this case, including:

- 1) Motion to enlarge time to respond to
Plaintiff's Motion for Judgment by Default
- 2) Motion for enlargement of time to respond
to Plaintiff's request for admissions
- 3) Motion for enlargement of time to respond
to Plaintiff's Motion for a Change of Venue
- 4) Any other motions now outstanding which are
not covered by 1,2,3 above

As grounds for opposing these motions, Plaintiff adopts
his Points and Authorities as placed in his Opposition for
the Motion to Dismiss except as they specifically deal with
the matter of dismissal, and further, Plaintiff relies upon
his Motion requesting that the Court give further consideration
to his its Order, signed by Judge McGuire, granting 30 additional
to respond.

Common to all of the Defendant's Motions is a desire to
divest this Court of the opportunity to hear the case on the
merits, a desire which flies into the teeth of statutory
provisions which grant jurisdiction and which have been
complied with by the Plaintiff.

All of the Motions filed by Defendant should be denied
as dilatory and without proper foundation, and FRCP 37 E should
be invoked to expedite the course of justice, which, at long
last, appears finally to have come to this case.

Respectfully,

Arthur S. Curtis, Attorney
816 National Press Bldg.
Washington, D.C. 20004
Na8-5696

Certificate: I have this
24th Jan 1970 mailed a copy of this
to Milo Coerper, One Farragut Square, counsel for Defendant.

DEFENDANT'S MOTION TO DISMISS

Comes now the Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., and moves the Court to dismiss this action without prejudice, pursuant to the Court Order filed in this action on October 20, 1969, on the grounds that Plaintiff has not perfected service on the Defendant by December 31, 1969, as required by said Court Order, copy of which is attached hereto as Exhibit A.

OF COUNSEL:

COUDERT BROTHERS



Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

200 Park Avenue
New York, N. Y. 10017
and
One Farragut Square South
Washington, D. C. 20006

Attorney for Defendant

DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME
TO RESPOND TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Comes now the Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., and moves the Court for an extension of time in which Defendant may respond to Plaintiff's Request for Admissions under Rule 36 of the Federal Rules of Civil Procedure, in the event that this Court does not act favorably on Defendant's Motion to Dismiss this action filed herewith, of thirty (30) days, commencing with the day after this Court may act unfavorably on Defendant's said Motion to Dismiss.

OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017

and

One Farragut Square South
Washington, D. C. 20006



Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME
TO RESPOND TO PLAINTIFF'S MOTION FOR A
CHANGE OF VENUE

Comes now the Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., and moves the Court for an extension of time in which the Defendant may respond to Plaintiff's Motion for a Change of Venue to the Southern District of New York (New York City), in the event that this Court does not act favorably on Defendant's Motion to Dismiss this action filed herewith, of thirty (30) days, commencing with the day after this Court may act unfavorably on Defendant's said Motion to Dismiss.

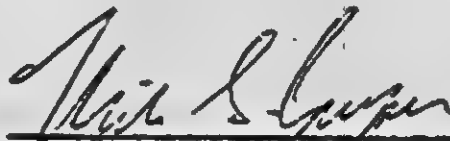
OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017

and

One Farragut Square South
Washington, D. C. 20006



Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

DEFENDANT'S MOTION FOR ENLARGEMENT OF TIME TO
RESPOND TO PLAINTIFF'S MOTION FOR JUDGMENT BY DEFAULT

Comes now the Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., and moves the Court for an extension of time in which the Defendant may respond to Plaintiff's Motion for Judgment by Default under Rule 36 of the Federal Rules of Civil Procedure, in the event that this Court does not act favorably on Defendant's Motion to Dismiss this action, filed herein, of thirty (30) days, commencing with the day after this Court may act unfavorably on Defendant's said Motion to Dismiss.

OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017

and

One Farragut Square South
Washington, D. C. 20006

Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

MOTION FOR JUDGMENT BY DEFAULT
UNDER F.R.C.P. # 4(b) and
F.R.C.P. # 54 (c).

The Plaintiff, Arthur S. Curtis, by counsel, respectfully moves this Court to enter in his behalf, a Judgment by Default, under F.R.C.P. # 4(b) and F.R.C.P. # 54 (c), for the reason that the Defendant was properly served in the District of Columbia in 1955, at a time when it was doing business here and holding itself out as doing business here, and had an authorized representative who personally received service, as is shown by his attached affidavit, but that Defendant failed to answer as required by this Court. The Affidavit of William McAdams, the Defendant's representative at the time, a man who according to oral statements to the undersigned received at the time \$4,000. per month approximately from the Defendant for his work in the District of Columbia where he was personally served, is attached, and is made part of the points and authorities which follow.

Respectfully submitted,

Arthur S. Curtis, counsel
816 National Press Bldg.
Washington, D.C. 20004
Na8-5696 (pro se)

CERTIFICATE OF SERVICE:

This is to certify that I have this 20th day of January mailed postage prepaid a copy of this Motion and the attached Points and Authorities to Mr. Coerper; of the firm of Coudert Bros., One Farragut Square, Washington, D.C.



Arthur S. Curtis

AFFIDAVIT OF ARTHUR S. CURTIS

The undersigned Arthur S. Curtis having first been duly sworn states that the following is ~~true~~ to his best knowledge and belief:

1. That the attached page of a telephone book is from a telephone book in his possession which bears the date September, 1954, and that the attached is a true and exact copy of said page.
2. That William McAdams, whose affidavit is attached, stated to the undersigned, that the said William McAdams received from Foote, Cone and Belding, the defendant here, approximately \$4,000 per month for his services in connection with running a Washington office of the defendant as described in Mr. McAdams' affidavit. Further Mr. McAdams stated that he did not wish to place this figure in his affidavit as a published record.
3. The undersigned then states that he was unable to obtain an affidavit from Mr. McAdams until January, 1970, and therefore was unable to make the motion for judgment by default prior to the present time. Mr. McAdams did not wish to become involved in this law suit particularly when his affidavit might be used against a former employer from whom he received at one time \$4,000 per month.

Arthur S. Curtis
816 National Press Bldg.
Washington, D.C. 20004
National 8-5697

Subscribed and sworn before me
this _____ day of _____ 1970.

My commission expires _____.

Notary Public

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

38

ARTHUR S. CURTIS,

PLAINTIFF

C.A. 3529-55

VERSUS

FOOTE, CONE AND BELDING

AFFIDAVIT OF WM. MC ADAMS

DEFENDANT

The undersigned William Mc Adams, being first duly sworn,
states under oath that the following is true:

1. That in 1954 and 1955, Foote, Cone and Belding had as one of its accounts the "Watchmakers of Switzerland"; That during these same years, Foote, Cone and Belding employed the undersigned to service said account; that the undersigned received payment for his services in fees; that with the knowledge and consent of officers and directors of Foote, Cone and Belding, he maintained offices at 711 14th St NW, D.C. during this period; that the telephone was listed under the name, Foote, Cone and Belding; that the Bulletin Board of the Building listed the offices under the name, Foote, Cone and Belding; that he did business on the above described account from said offices during the above periods as the public relations counsel.

2. That while he was employed as above stated, he was served with the summons and complaint in the above case, by means of personal service; that upon receiving the summons and complaint, he telephoned long distance to Robert Carney, President of Foote, Cone and Belding, and informed him that he had been so personally served; that at the request of the said Robert Carney, he mailed the summons and complaint to the said Robert Carney.

Subscribed and sworn to before me this 14th day of January
1970. My commission expires _____

Notary Public

RESPONSE OF SEARS, ROEBUCK AND CO., GARNISHEE, TO
PLAINTIFF'S INTERROGATORIES IN ATTACHMENT BEFORE
JUDGMENT

39.

Comes now Sears, Roebuck and Co., a body corporate, incorporated under the laws of the state of New York, and through counsel makes the following answers to Plaintiff's interrogatories.

1. At the time of service of Plaintiff's Interrogatories in Attachment Before Judgment and Writ of Attachment served therewith, Sears, Roebuck and Co. was indebted to Defendant, Foote, Cone and Belding, Inc., in an amount in excess of \$2,500.00, the sum of Plaintiff's alleged claim against Defendant.

2. In further response, Garnishee states that such indebtedness to Defendant was not and is not payable to Defendant by any representative or facility of Garnishee located within the District of Columbia; that such indebtedness of Garnishee to Defendant is not payable to Defendant in the District of Columbia; and, that such indebtedness, consisting of monies due for services rendered, did not arise from any transaction between Garnishee and Defendant effected in the District of Columbia.

3. In further response, Garnishee states that no goods, chattels, or credits of the Defendant are in the charge or possession of any representative or facility of Garnishee located within the District of Columbia.

I, Jerry H. Opack, Counsel for Sears, Roebuck and Co., on information and belief, state the above answers to Plaintiff's interrogatories are true.

RETURN ON SERVICE OF WRIT

46.

United States of America
Southern DISTRICT OF *New York*

Arthur S. Curtis

Clerk's No. *D.C. - CA 3529-55*

vs.

Forte, Cone, & Building, Corp.

U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed *Writ of Habeas Corpus*
(Write)
on the therein-named *Forte, Cone and Building, a Corporation*
(Name of individual, company, corporation, etc.)
It is a non-resident of the District of Columbia
by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was
done in endeavoring to serve) *Mr. Biliar, V.P. Administration*
(Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made) _____
35th Floor 200 Park Ave
(Address—Street number, apartment number, rural route, etc.)
New York in the said District
(City) (State)
at *3:55* a.m.-p.m., on the *22* day of *Dec*, 19*69*

SERVICE NOT COMPLETED

Date _____
I hereby certify and return, that on the _____ day of _____, 19____,
I received the within _____ and that after
diligent search, I am unable to find the within named _____
_____ within said district.

Marshal's fees _____

Mileage _____

A.R. Warner
United States Marshal
By *Therese J. Shuler*
Deputy.

RETURN ON SERVICE OF WRIT

41.

United States of America
Southern DISTRICT OF New York

Arthur S. Curtis

Clerk's No. D.C. 3529-55

Foots, Cone and Belding, a Corp

U.S. Marshal's No. _____

SERVICE COMPLETED or ENDEAVOR TO SERVE (Lias Rochuck Corp)

I hereby certify and return that I ~~endeavored to serve~~ ^{served} the annexed Attachment before
Foots, Cone and Belding, a Corporation ^(Write) Judge
Reft is a non-resident of the District of Columbia
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was
done in endeavoring to serve) Mr. Belian, V.P. Administration
(Name of individual or agent of company, corporation, etc.)

personally at (if endeavor—show addresses where endeavors made) _____

35th Floor 700 Park Ave
(Address—Street number, apartment number, rural route, etc.)
New York NY
(City) (State)

at 355 am on the 22 day of Dec, 1969 in the said District

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____

I received the within _____ and that after
diligent search, I am unable to find the within named _____
_____ within said district.

Marshal's fees _____

Mileage _____

A. R. Thomas
United States Marshal.
By Therint Schubert
Deputy.

The Plaintiff respectfully moves this Court to transfer this case to the Southern District of New York (New York City), for these reasons:

1. That 28 U.S.C. 1404 (a) reads as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. That in 1955 when this suit was filed in this Court, the principal office of the defendant was in New York City, at 347 Park Avenue, and that its principal office is still in New York City, where it now rents more than two full floors in the Pan Am building at 200 Park Avenue.

3. That in 1955 when this suit was filed in this Court, defendant rented an office at 711 14th St. N.W., D.C. and did business in the District of Columbia; and that Plaintiff made numerous attempts to serve defendant, all without success; that defendant then closed its D.C. office rather than appoint a registered agent as required by the then-new statute.

4. That since 1955, numerous attempts have been made to serve defendant as is reflected on the docket sheet.

5. That service by attachment before judgment has finally been effected by serving two of defendant's clients in this area, Sears, Roebuck Co., and Merrill, Lynch, Pierce, Fenner and Smith, through the use of a special process server, James Doud, Esquire, a member of the Bar of this Court, who was appointed by special order of Chief Judge Curran.

6. That as part of the Attachment Before Judgment, and as an alternative to publication against defendant, Plaintiff personally travelled to New York and the United States Marshall there personally served copies of the Attachments Before Judgment upon the defendant at its New York offices, as

is shown by the papers in this case and copies of the Marshall's return which is attached hereto.

7. That there was filed on 23 December 1969 in the Southern District of New York (New York City), an entirely new suit by plaintiff against defendant, identical to the present suit, and that the defendant has already been served in New York with copies of this suit, Civil Action 69 - 5649, as is shown by the U.S. Marshall's return, reproduced herewith as an exhibit.

8. That the parties are now litigating in two jurisdictions, here and in New York, over the same case.

9. That Plaintiff has employed astute counsel in New York to represent him, one Stanley M. Estrow, age 60, who has spent his legal life in the publications, advertising, and graphic arts fields; and, that defendant has legal counsel in New York as well.

10. That Plaintiff is no longer a resident of the District of Columbia; and that he is required, as a matter of reentering the publishing business, to make frequent business trips to New York.

11. That on best knowledge and belief, all or almost all of the witnesses in this case are in New York.

12. That it is presently more convenient to both parties to have this case transferred to New York, and more convenient also to the witnesses, particularly if the two cases were consolidated there, so that in one litigation there might be brought about the resolution of their differences without the excessive cost of overlapping and duplication in discovery, witnesses, and trials.

13. That it would be in the interest of justice to transfer this case to New York, to avoid the expenses and loss of time described in 12, above.

14. That this Court has authority under 28 U.S.C. 1404 (a) and the cases decided thereunder, to grant the relief requested.

Respectfully submitted

United States District Court

SUMMONS IN A CIVIL ACTION

FOR THE

D. C. Form No. 45 Rev. (3-48)

SOUTHERN DISTRICT OF NEW YORK

44.

CIVIL ACTION FILE NO. _____

ARTHUR S. CURTIS, t/a
A. S. CURTIS FEATURES SYNDICATE
1500 Arlington Boulevard
Arlington, Virginia

69 CIV. 5645

Plaintiff

v.

FOOTE, COKE AND BELDING
200 Park Avenue
New York, New York

Defendant

SUMMONS

RECEIVED
1969 DEC 23 PM 12:42
S.D.N.Y.
Wm. D. Edwards

To the above named Defendant :

You are hereby summoned and required to serve upon **STANLEY M. ESTROW, ESQ.,**

plaintiff's attorney , whose address is 529 Fifth Avenue, New York, N. Y.,

an answer to the complaint which is herewith served upon you, within **twenty** days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

23 Dec 1969

JOHN LIVINGSTON
Clerk of Court.

R. S. Edwards

Deputy Clerk.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

RETURN ON SERVICE OF WRIT

45.

United States of America
SOUTHERN DISTRICT OF NEW YORK

ARTHUR S. CURTIS t/m
A.S. CURTIS FEATURES SYNDICATE
vs.

Clerk's No. 69 CIV. 5645

FOOTE, CONE AND BELDING

U.S. Marshal's No. 4696-69

SERVICE COMPLETED or ENDEAVOR TO SERVE

I hereby certify and return that I ~~endeavored to serve~~ served the annexed SUMMONS COMPLAINT
(Writ)
on the therein-named FOOTE, CONE AND BELDING
(Name of individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with (if endeavor—describe what was
done in endeavoring to serve) EDWARD W. FORD
(Name of individual or agent of company, corporation, etc.)

- MANAGER OF ACCOUNTING OFFICE
SALES SERVICES - AUTHORIZED
personally at (if endeavor—show addresses where endeavors made)

200 PARK AVENUE - 35TH FLOOR
NEW YORK NEW YORK
(City) (State)
in the said District

at _____ a.m.-p.m., on the 23RD day of DECEMBER, 19 69

SERVICE NOT COMPLETED

Date _____

I hereby certify and return, that on the _____ day of _____, 19____,
I received the within _____ and that after
diligent search, I am unable to find the within named _____
_____ within said district.

Marshal's fees _____

Mileage _____

Anthony R. Mariano
United States Marshal.

By Harry J. Carite
Deputy.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,

Plaintiff

versus

Civil Action No. 3529-55

FOOTE CONE AND BELDING,

Defendant

FILED

DEC 17 1959

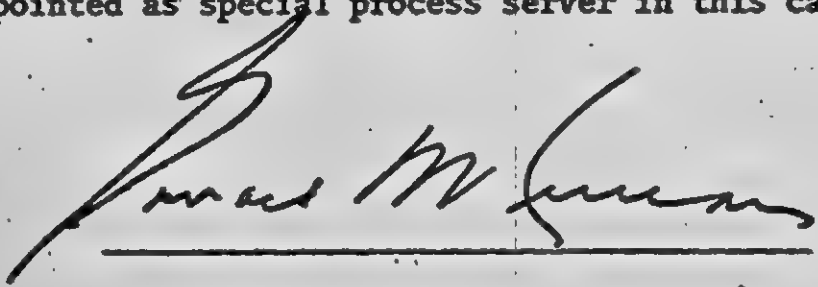
ROBERT M. STEARNS, Clerk

RECEIVED
CLERK
DEC 17 1959
O R D E R

Upon consideration of the Motions for leave to amend the complaint so as to clarify same, and to appoint James Doud, Esq. as special process server, and after due deliberation, it is by this Court,

ORDERED, that leave to amend the complaint be and hereby is granted, and it is further

ORDERED, that JAMES DOUD, ESQ., a member of the Bar of This Court, be and hereby is appointed as special process server in this case.



UNITED STATES DISTRICT JUDGE

ENTERED:

12/17/69

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

OCT 20 1969

ARTHUR CURTIS
t/a A.S. Curtis Feature Syndicate
Plaintiff

v.

FOOTE, CONE AND BELDING, INC.
Defendant.

ROBERT M. STEARNS, Clerk

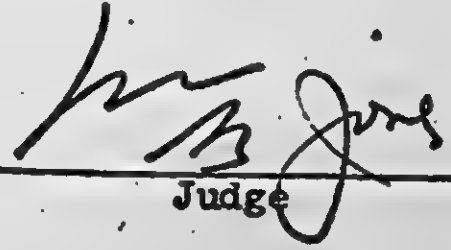
Civil Action

No. 3529-55

ORDER

Upon consideration of the Order to Show Cause
issued on October 9, 1969, and counsel for the
plaintiff being present, it is by the Court this 20th
day of October, 1969,

ORDERED that if service on the defendant is not
perfected by December 31, 1969, the cause shall be
dismissed without prejudice by the Clerk on that
date.


Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS t/a
A. S. CURTIS FEATURE SYNDICATE
1319 ~~F~~^{816 Press} Street, N. W.
Washington, D. C. *Blag.*

Plaintiff

vs.

CIVIL ACTION NO. 3529-55

FOOTE, CONE, AND BELDING
Room 622, 711 14th Street, N. W.
and
(247 Park Avenue, N.Y., N.Y.)

Defendant

COMPLAINT FOR MISAPPROPRIATION OF IDEA AND UNFAIR
COMPETITION

FIRST CAUSE OF ACTION

1. Plaintiff is a resident of the District of Columbia and defendant is a corporation doing business in the District of Columbia. The amount in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.
2. At all times hereinafter mentioned plaintiff was and now is engaged in writing and creating original scripts and ideas for presentation in books, magazines, comic strips and for radio and television programs.
3. In the year 1945 plaintiff conceived the idea of dramatizing the heroic feats of winners of the Congressional Medal of Honor, the Nation's highest award for bravery on the battlefield.

4. Subsequently plaintiff adapted the aforesaid idea for 49 comic strip purposes and produced and developed a series of cartoon sketches and writings which plaintiff entitled "Medal of Honor."

5. Plaintiff duly copyrighted the said comic strip series known as "Medal of Honor."

6. Plaintiff sold the right to reproduce and publish the said comic strip to newspapers throughout the country, and said comic strip was, during and between the years 1945 and 1949, reproduced by a large number of major newspapers in cities throughout the country.

7. In the year 1946 plaintiff conceived the idea of adapting and presenting the material and format already used in his comic strip for the creation of a series of dramatic radio programs and/or television documentary plays and offered his ideas to various media.

8. Prior to the 24th day of October, 1946, and in the course of offering said comic strip to defendant, plaintiff disclosed to defendant that he had conceived the idea of adapting and presenting the material comprising the comic strip series in the form of radio and television shows and in the form of narrative and panel presentations, and offered and submitted to defendant said idea, title, its central theme, scheme, plan, and format with the expressed purposes of effecting a sale of the proposed central idea to the defendant. On November 2, 1953, and other dates both prior and subsequent thereto defendant did, without the

knowledge, approval, sanction or permission of the plaintiff and in violation of the plaintiff's right of priority and ownership therein, prepare, produce, and disseminate to newspapers, magazines, and other communication media, advertising employing the idea and method of presentation substantially identical in form, substance and design with the comic strip, narrative program, and display panels, conceived, originated by plaintiff.

9. The use and appropriation by defendant of the aforesaid plan and idea constituted an acceptance by the defendant of the aforesaid plan and offer of the plaintiff.

10. The plaintiff's idea, theme, plan, and format were used in advertising presented to the public under the defendant's auspices through the facilities of magazines throughout the country in a series of advertisements identified as "Medal of Honor."

11. On information and belief plaintiff alleges the basic idea, plan, scheme, and format so disclosed by him to the defendant as aforementioned were original and new in all respects and had never been published or dedicated to the public therefore, and that defendant would not have been able to offer said idea for advertising use, but for the disclosure made by the plaintiff.

12. Upon information and belief the fair and reasonable value of the aforesaid comic strip, narrative presentation, and title, its central theme, idea, plan, scheme, and format, and the suggestions by plaintiff for its use by defendant and adaptability for advertising purposes is \$250,000.00.

13. Plaintiff has duly demanded from the defendant payment for the use of the plaintiff's title, theme, format, idea and plan but such payment has at all time been refused.

SECOND CAUSE OF ACTION

14. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" to "13" herein with the same forces and effect as through fully set forth at length.

15. The aforesaid dramatic presentation, its central theme, scheme, plan, title, format and idea were the sole and exclusive property of the plaintiff.

16. The appropriation by defendant of the said dramatic presentation, its central theme, scheme, plan, title, format, and idea as hereinbefore set forth, resulted in benefit and profit to the defendant.

17. The fair and reasonable value of the aforesaid dramatic presentation, its central them, scheme, plan, format, title, and ideas an adaptation for advertising purposes is \$250,000.00.

18. The plaintiff duly demanded from the defendant payment for the use of the plaintiff's theme, title, format, plan, and idea but such payment has at all times been refused.

THIRD CAUSE OF ACTION

19. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" to "18" herein with the same force and effect as though fully set forth at length.

20. The use of said title or name "Medal of Honor" was original with the plaintiff and had not therefore been used as the title of any comic strip, play, radio program or other dramatic or advertising presentation.

21. The title or name "Medal of Honor" by reason of wide publication as aforesaid became identified in the public mind as the name of a dramatic production or literary presentation written by the plaintiff and given by and under his auspices, and the press and public associated and continue to associate the name "Medal of Honor" with the literary and dramatic efforts originated by the plaintiff.

22. The said publication of the comic strip entitled "Medal of Honor" in newspapers and periodicals throughout the United States yielded large profits to the plaintiff.

23. The plaintiff continues to sell and offer for sale his literary creation known under the name and title "Medal of Honor".

24. The defendant with full knowledge of the success and popularity achieved by plaintiff's said literary and dramatic production and the public interest created therein, and the extensive and favorable advertising and comment which the same received in the press, and of the interest taken therein by the public, with full knowledge of the fact that the title or name "Medal of Honor" had first been applied to distinguish and identify the plaintiff's literary property, and that the public associated

and linked the name "Medal of Honor" with the plaintiff's literary endeavor, and without leave of the plaintiff and in violation of his rights, has unlawfully distributed and caused to be exhibited a series of magazine advertisements throughout the United States under the title or name "Medal of Honor".

25. Defendant has never been licensed, authorized, or permitted by the plaintiff either orally or in writing to use the name or title "Medal of Honor" or any adaptation thereof, in connection with any magazine or newspaper advertising, theatrical entertainment, radio or television show, or any other literary or dramatic endeavor.

26. Defendant's wrongful appropriation and use of the title "Medal of Honor" in connection with its magazine advertising is sufficient to mislead the public and to generally lead it to believe that defendant's magazine advertising is adapted to reproduce literary endeavors of the plaintiff, and said acts constitute unfair competition on the part of defendant.

27. Defendant has thus attained great benefit through the use of the title "Medal of Honor" and in connection with its magazine advertising has thereby greatly injured and damaged plaintiff's property rights therein.

28. Plaintiff has been damaged thereby and defendant unjustly enriched in the sum of \$250,000.00.

FOURTH CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation contained in paragraphs numbered "1" to "29" herein with the same force and effect as though fully set forth at length.

30. Plaintiff, at the time of offering defendant the said "Medal of Honor" comic strip, narrative, and display panel, described to defendant in great detail the scheme, plot, and format of said presentation and the idea embodies therein.

31. Defendant without the consent, knowledge, approval, sanction, or permission of the plaintiff, and violation of plaintiff's right of property therein, produced and distributed a series of magazine advertisements employing the idea and method of presentation, substantially identical in form, substance and design with the comic strip, narrative, and display panel originated by plaintiff.

32. The conduct of the defendant constitutes an illegal and improper appropriation of plaintiff's rights in the comic strip, narrative, and panel display; its plan, scheme, and design.

33. The conduct of the defendant as aforesaid has deprived the plaintiff of a valuable property right in the that the comic strip, narrative, and display panels so originated by the plaintiff have lost their individuality and originality and have been immeasurably lowered in value as a commercial product.

34. By reason of defendant's conduct plaintiff has been and will be unable to sell his strip, narrative, and display panel, and has thereby been deprived of his rights in the said scheme, plot, and plan and of the profits which would have accrued to him.

35. By reason of the foregoing the plaintiff has been damaged in the sum of \$250,000.00.

WHEREFORE, judgment is demanded against defendant as follows:

A. On the First Cause of Action plaintiff demands judgment against defendant in the sum of \$250,000.00.

B. On the Second Cause of Action plaintiff demands judgment against defendant in the sum of \$250,000.00.

C. On the Third Cause of Action plaintiff demands judgment against defendant in the sum of \$250,000.00.

D. On the Fourth Cause of Action plaintiff demands judgment against defendant in the sum of \$250,000.00.

E. Plaintiff recover the costs and disbursements of this action.

Arthur S. Curtis, Counsel Pro Se
1319 F Street, N. W.
Washington 4, D. C.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA

ARTHUR S. CURTIS

VS.

FOOTE CONE AND BELDING

C.A. 3529-55

Washington, D. C.

Wednesday March 18, 1970

MOTION FOR CHANGE OF VENUE ET AL

The above entitled motions came on for hearing
before the Honorable Joseph C. Waddy, United States
District Judge, at 4:10 pm.

APPEARANCES:

On behalf of the Plaintiff:

Arthur Curtis Esq.

On behalf of the Defendant:

Milo Coerper, Esq.

MR. COERPER: PROCEEDINGS

MR. COERPER; If it please the Court --

MR. CURTIS: May I be heard, Your Honor --

THE COURT: Just a minute, gentlemen. There are seven motions set for hearing before me in this case and I will have this proceeding conducted in an orderly way.

MR. COERPER: And we would like that, Your Honor but--

THE COURT: You are the plaintiff, Mr. Curtis; what do you wish to bring to the attention of the Court preliminarily?

MR. CURTIS: Preliminarily, there are seven motions in this case set down in the order in which they were filed, first in and first out, which I think is just and I would like to have the motion for change of venue heard first and consequently I should have the podium.

THE COURT: I beg your pardon?

MR. CURTIS: I think I should be entitled to speak first because I made the motion for change of venue to New York back on December 30 1969.

THE COURT: The Court will consider the motion for change of venue first because if that motion is granted some of the others would not need to be considered at this time.

MR. COERNER: Well may I speak to that --

THE COURT: Will you first state your name, sir.

MR. COERPER: Oh yes -- my name is Milo Coerper and I am attorney for the defendant, Foote Cone and Belding.

On February 20th 1970 there were three recommendations made by the pretrial examiner upon consideration of defendant's motion for enlargement of time to respond to plaintiff's motion for change of venue and this was also for plaintiff's motion for judgment of default, and on failure of counsel for plaintiff to appear whereas counsel for defendant did appear and on the 20th day of February the pretrial examiner ordered that said motion be allowed with the further recommendation that the time be extended to April 1 1970 for defendant to respond to plaintiff's motion for change of venue.

This, as I say Your Honor, also applied on the motion for judgment of default.

Now we have both just been talking with Mr. Huey, the Motions Clerk, and he admitted that it was an error to place 1 and 2 on the calendar today because I have not as yet responded to them, so I think it would be more appropriate to first answer the objections of Mr. Curtis to this recommendation of the pretrial examiner, and if that is upheld then I certainly would feel it would be proper to go ahead, but I, of course, have not yet responded to these two motions. On the other hand, I would like this whole issue disposed of---

THE COURT: This matter should be resolved.

MR. COERPER: Right - I agree, Your Honor -- but I wanted you to know that this is the position.

THE COURT: It appears to me that inasmuch as there is a pending case in New York which I understand to be on all fours, and where there is no question about service, that this case ought to be transferred and, if the New York Court sees fit to dismiss in the light of their Statute of Limitations, then many of these things would be disposed of.

MR. CURTIS: I am willing to stipulate to Your Honor's statement to that effect.

MR. COERPER: It is just that we would lose one of our defenses at least --

THE COURT: How would that be?

MR. COERPER: Because the case would be continued in New York as it it were going to be heard, and the Statute of Limitations would not be available in New York because you would have transferred the case from the District of Columbia to New York.

THE COURT: Well if the Statute of Limitations is applicable here this being a District of Columbia cause of action, would not the New York Court apply the District of Columbia law?

MR. COERPER: Not necessarily, Your Honor. It is

is very possible that -- while we would like to see this case dismissed with prejudice because of the failure to prosecute, if it is transferred to New York on a change of venue we don't know what would happen.

THE COURT: Well I don't think it would be proper for this Court to dismiss with prejudice where other judges of this Court have from time to time reinstated this case. I certainly would be saying that the other judges were wrong in reinstating the case on those occasions when they reinstated the case and I do not think it would be proper for me to do such.

MR. COERPER: Well, we do think that the rule, Your Honor, only envisions that a case is supposed to be reinstated once and this has been reinstated four or five times now.

THE COURT: As to the local rule, a local judge has the right to waive it, whereas any number of judges have waived it. I am saying if I should do as you suggest I would be saying that all those judges were wrong in reinstating the case.

MR. COERPER: Well there was an argument on this very point before Judge Hart recently, Your Honor, and it was upheld in the Court of Appeals, where the case had been pending fourteen or fifteen years in this court and where

the plaintiff had not proceeded with due diligence and we would ask the Court to give consideration to that.

THE COURT: I think it would be an entirely different position were it not for the fact that he has filed a motion to transfer and you have also filed a similar motion in New York.

MR. COERPER: Right.

THE COURT: Now it would be entirely different and closer to the situation that you mentioned which Judge Hart had before him, if the plaintiff had not, late thought it be, filed a motion to transfer. He has filed documents in New York and he has served in New York involving the same litigation.

MR. COERPER: That is correct, Your Honor.

THE COURT: Yes.

MR. COERPER: It is just that it may prejudice our defenses because of the Statute of Limitations--

THE COURT: Well I certainly cannot assume in that regard - I would be pre-judging something that might happen in New York. On the other hand, I am not familiar with an order staying the matter until April 1 and on the list here--

MR. CURTIS: May I speak to that?

MR. COERPER: There were three recommendations of the pretrial examiner on February 20 1970 which did allow us until April 1 to respond to plaintiff's motion for change of venue.

THE COURT: Well, do you still want that time?

MR. COERPER: Well in view of what Your Honor has said I think maybe I should ask for it, yes.

THE COURT: I do not want to prejudice you.

MR. CORPER: Yes, well I appreciate that and I think I would like the opportunity to respond to the motion for change of venue and perhaps present points and authorities to Your Honor on this very question of the rights that might be lost by the defendant if the case goes from the District of Columbia to New York.

MR. CURTIS: Your Honor, considering how important this case is to me personally, obviously -- let me say not obviously but it would be reasonable that if I had known this matter would be heard I would have been present but I did not know this matter was going to be heard in front of Mr. Finn -- I am sure that Your Honor has heard that many many times from many many lawyers--

THE COURT: But that is not the issue here.

MR. CURTIS: But I have made the motion for Your Honor to overrule Mr. Finn's recommendation. It is only the 18th; if Your Honor limits the time in which he could respond to five days it would mean he would have until the 23rd to respond and Your Honor would still have it on your calendar between the 23rd and the first of the month to consider his defenses, and reply as to whether Your Honor should transfer

the case to New York -- but I might say, Your Honor, that I whole-heartedly agree with Your Honor that this case should be heard in New York.

In retrospect there were two jurisdictions in which we could have filed this case - one was Washington and the other was New York and the reason we filed it here was because Judge Alexander Holtzoff was here and he was a man with great luminiscence in literary property cases--

THE COURT: Well is that not irrelevant to what we have here?

MR. CURTIS: But that is why we filed it here and I do think that it should be transferred to New York and Your Honor certainly has the power to shorten the time to a period before April while it is still on your calendar.

THE COURT: Well, this Court is not going to act precipitously and cut off any man's rights that he is entitled to.

MR. CURTIS: Yes Your Honor - but normally he would have five days to answer.

MR. COERPER: Your Honor, Mr. Curtis had two opportunities to be present with the pretrial examiner when this case was before him - the first time he was not there -- he did call in I understand from Virginia, when I was present, and the second time it came up he was not present, and based upon my

request Mr. Finn went ahead and gave me until the first of April to respond but in view of the comments Your Honor has made I would still like to have the opportunity to respond to the motion for change of venue.

THE COURT: Yes - well I am trying to find the recommendation of the pretrial examiner--

MR. COERPER: I have my copy which I would be glad to hand up to the Court.

THE COURT: Were there two recommendations or just one?

MR. CORPER: There were three; Your Honor -- one would not apply to these motions before you today because it was a request to extend the time to answer certain requests for admissions which was not on the calendar, and two were for the change of venue motion and the motion for default judgment.

MR. CURTIS: Your Honor --- could I speak to the Court while the Court is looking through the file?

THE COURT: Yes.

MR. CURTIS: The effect of all of this, Your Honor --

THE COURT: I thought you wanted to speak to the Clerk.

MR. CURTIS: No - I said to the Court. I am sorry, Your Honor.

THE COURT: Not right now. I am trying to locate something.

It appears that there were three orders entered by

the pretrial examiner on February 20th. On 25th February plaintiff filed one paper objecting to all three orders.

MR. COERPER: That is correct, Your Honor.

THE COURT: And those objections have been set down and the motions that are before me today.

MR. COERPER: That is correct.

THE COURT: Is there something else you wanted to say Mr. Curtis?

MR. CURTIS: Just Your Honor, on those objections - it would appear to me that the motion for change of venue and the objections to the pretrial examiner's order could be taken up simultaneously if Your Honor believed that Your Honor could rule.

THE COURT: But there was a recommendation of the pretrial examiner that the defendants be given until the 1st of April in order to file objections -- that appears to me to have been a reasonable recommendation. I do not think I ought to say to counsel at this late moment that he cannot have that time.

MR. CURTIS: Your Honor, I believe that a change of venue motion in circumstances like these would only allow five days. We filed this on December 20 1969 and he has managed to keep the case going on the motions until he could file a motion to dismiss hoping in this way to defeat the case.

Now Your Honor, I was not present on the 20th and it says I wasn't present. I was not present because I didn't receive the notice, even as Your Honor couldn't find the pretrial examiner's orders. I did not know there was going to be a hearing or certainly I would have been here. This is so important to me -- this represent twenty five years of the life of Arthur Curtis and years of starvation in the Law--

THE COURT: Mr. Curtis, there is nobody under the sun who wants to dispose of this case and get it off the docket more than this Court does.

MR. CURTIS: Your Honor --

THE COURT: But it seems to me only fair that we proceed in this manner. I will overrule the objections to the pretrial examiner's recommendations which will give the defendant until April 1st within which to file their opposition to the motion for change of venue and for default judgment. I will retain jurisdiction of this case and the Motions Clerk will set it down for the first available date after 1st April --- although I will not be sitting in Motions Court, I will retain jurisdiction.

MR. CURTIS: Your Honor, may I suggest respectfully that the case, the whole matter, be continued then until that time?

THE COURT: All of these motions will be continued and heard at the same time on the very next date available, after April 1st.

MR. COERPER: Yes - thank you Your Honor.

MR. CURTIS: May I address the Court on just one more manner -- on the 15th of April I must be in Florida. I have an invitation from General Doolittle ^{to} ~~to~~ a reunion group ^{to be a} ~~to be a~~ ^{quest} ~~at~~ for the Tokyo Raid ^{Reunion}; the night before the 15th I would like to be there--


MR. COERPER: Well I have to be out in Louisville, Kentucky on April 15th.

THE COURT: You will arrange with Mr. Huey for a suitable date.

MR. CURTIS: Yes, Your Honor.

(Whereupon the hearing was concluded)

CERTIFIED



JOAN CURTIS BLAIR, CSR.
OFFICIAL COURT REPORTER.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS)
Plaintiff)
v.) CIVIL ACTION NO. 3529-55
FOOTE, CONE & BELDING, INC.)
Defendant.)

Washington, D. C.

Thursday, May 14, 1970.

The above-entitled cause came on for hearing before
the HONORABLE JOHN H. PRATT, UNITED STATES DISTRICT JUDGE,
at 10:15 a.m.

APPEARANCES:

ARTHUR S. CURTIS, ESQ.
Pro Se.

MILO G. COERPER, ESQ.
Counsel for the Defendant.

EXCERPTS OF PROCEEDINGS

P R O C E E D I N G S

* * *

MR. CURTIS: Section 205 of the Civil Practices Act points out that if a case is dismissed by this Court, then it would prejudice my case up there.

Otherwise, I have six months from the time that the case would otherwise -- if it were terminated in some other way, I would have six months in New York -- that was changed in 1965 from one year to six months -- to pursue my action.

Now, I know Your Honor in a case like this would like to see a disposition on the merits.

THE COURT: I don't care.

Frankly, I think this case is just a travesty on the Court. I think that this Court has been taken advantage of. I think that this would never have happened with the individual calendar.

We have gotten down now where this happens to be my problem, and this is where it is going to end. I can't shift it to anybody else.

We have had something like seven or eight Judges of this Court who have taken a bite at this thing, and sometimes more than one bite. Not a single one has gotten an overall view of this case in its entirety. And, Mr. Curtis, the buck is going to stop here. We are going to dispose of it one way or the other today.

* * *

MR. CURTIS: Did Your Honor have a copy of this transcript in the file?

THE COURT: I don't think so. What is the date of it, Mr. Curtis?

MR. CURTIS: Well, Your Honor, this is the transcript of the proceedings in front of Judge Waddy, March 18, 1970.

On page 4 -- this was the hearing before you had it -- Judge Waddy said:

It appears to me that inasmuch as there is a pending case in New York which I understand to be on all fours, and where there is no question about service, that this case ought to be transferred; and if the New York Court sees fit to dismiss in the light of their Statute of Limitations, then many of these things would be disposed of.

Now, that is what Judge Waddy said in his hearing.

Then, Your Honor, he also said on page 5:

Well, I don't think it would be proper for this Court to dismiss with prejudice where other Judges of this Court have from time to time reinstated this case. I certainly would be saying that the other Judges were wrong in reinstating the case on other occasions when they reinstated the case, and I do not think it would be proper for me to do such.

* * *

MR. CURTIS: Your Honor, he also said:

I will retain jurisdiction of this case, and the
Motions Clerk will set it down for the first available
date after the 1st of April. Although I will not be
sitting in the Motions Court, I will retain jurisdiction
of it.

*

*

*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
ARTHUR S. CURTIS, t/a
A. S. CURTIS FEATURES SYNDICATE,
Plaintiff,

-against-

FOOTE, CONE & BELDING, INC.,

Defendant.
----- x

69 Civ. 5645

DEFENDANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT

STATEMENT OF MATERIAL FACTS

Plaintiff's claim for relief in the present action proceeds from defendant's alleged misappropriation of plaintiff's ideas for the commercialization of the heroic exploits of United States Medal of Honor winners. On August 5, 1955, plaintiff filed a complaint in the United States District Court for the District of Columbia, which complaint set forth the same facts and alleged the same acts on the part of defendant as does plaintiff's December 1969 complaint in this Court. The alleged acts of defendant upon which the present action is based, therefore, took place prior to August 5, 1955. (A copy of plaintiff's complaint in the present action and his August 1955 complaint filed in the

District Court for the District of Columbia are supplied herewith as Exhibits A and B).

The United States District Court for the District of Columbia, Pratt, J., by orders dated May 25, 1970, denied plaintiff's Motion to Change Venue of his August 1955 District of Columbia action to the Southern District of New York, and granted defendant's Motion to Dismiss with Prejudice, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure, plaintiff's District of Columbia action for failure of plaintiff to prosecute same. (Copies of the aforementioned orders are supplied herewith as Combined Exhibit C). This same Court, Curran, C. J., by order dated June 26, 1970, denied plaintiff's motion to remove Judge Pratt from the case, to send the case to Judge Waddy, and to send the case to New York. (A copy of this order is supplied herewith as Exhibit D).

POINT I.

DISMISSAL WITH PREJUDICE PURSUANT
TO RULE 41(b) OF THE FEDERAL
RULES OF CIVIL PROCEDURE OPERATES
AS AN ADJUDICATION UPON THE MERITS,
THEREBY BARRING THE PRESENT ACTION
UNDER THE DOCTRINE OF RES JUDICATA

Rule 41(b) of the Federal Rules of Civil Procedure,
in its pertinent section, provides as follows:

. . . Unless the Court in its order
for dismissal otherwise specifies,
a dismissal under this subdivision
and any dismissal not provided for
in this rule, other than a dismissal
for lack of jurisdiction, for improper
venue, or for failure to join a party
under Rule 19, operates as an adjudi-
cation on the merits.

The United States District Court for the District of Columbia
in its order dismissing plaintiff's August 1955 action
specified that such dismissal was "with prejudice", thereby
unequivocally expressing its intention that the dismissal
order be considered an adjudication upon the merits of
plaintiff's claims. As such, plaintiff is forever barred
from maintaining another action based upon the same claims
set forth in his August 1955 action. Jameson v. Du Comb,
275 F.2d 293 (7th Cir. 1960); A. B. Dick v. Marr, 197 F.2d,
498, 502 (2d Cir. 1952); Larsen v. O'Reilly, 11 F.R.D. 604
(S.D.N.Y. 1951).

A comparison of plaintiff's District of Columbia
and New York complaints establishes beyond question that

these two actions arose out of the same claim. Defendant respectfully contends, therefore, that Rule 41(b) of the Federal Rules of Civil Procedure and the Jameson, A. B. Dick, and Larsen cases should be dispositive of this action, and that plaintiff's claim, having been adjudicated on the merits, is now barred as res judicata.

ATTEMPTS BY PLAINTIFF TO SERVE DEFENDANT

DATES OF ATTEMPTED SERVICE, ACCORDING TO THE RECORD

Aug. 9, 1955

21 September, 1955

5 December 1955 - George C. Smithy, Marshal - "by handing a copy thereof to (Mrs. ?) Wm McAdams by authorization of plaintiff - personally at 4545 Conn Ave Apt. 806 at 8¹⁵ p.m. on the 8th day of Dec. 1955

(Note: Motion for Default Judgment filed by Carl Shipley 3/7/56)

Sept. 9, 1957

March 24, 1958

May 5, 1958

November 12, 1958

March 4, 1960

Sept. 6, 1960

Feb. 20, 1961

Aug. 25, 1961

Feb. 28, 1962

Aug. 29, 1962

Feb. 28, 1963

October 9, 1963

March 10, 1964

Aug. 4, 1964

Dec. 31, 1964

May 25, 1965

Nov. 5, 1965

April 14, 1966

Sept. 2, 1966

Feb. 27, 1967

Aug. 18, 1967

Jan. 26, 1968

July 2, 1968

Dec. 26, 1968

June 12, 1969

ATTACHMENT BEFORE JUDGMENT, Dec. 18, 1969, Merrill, Lynch, etc; Dec. 18, 1969, Sears Roebuck and Company

DISMISSALS AND REINSTATEMENTS

Dismissed Oct 19, 1956 without prejudice, reinstated 9 Nov. 1956, J. Matthews

Dismissed June 3, 1959, without prejudice, Reinstated Judge Holtzoff, R. 16

Dismissed Sept. 21, 1963, without prejudice, Reinstated Judge Holtzoff, R. 19

United States Court of Appeals
for the District of Columbia Circuit

SUPPLEMENTAL APPENDIX

FILED OCT 13 1971

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nathan J. Paulson
CLERK

No. 24,572

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Arthur S. Curtis
816 National Press Building
Washington, D.C. 20004
Attorney for Appellants

SUPPLEMENTAL APPENDIX WITH PARTS DESIGNATED BY APPELLEE

FOUND AT.....

(Note: copied from Docket Sheets as marked by Appellee)

1. 1955, Dec. 5: Summons, copy & copy of complt issued ;served 12/8/55 fi 1
2. 1956 Mar. 8: Motion of pltf. for default judgment; c/m 3-7-56 2
3. Oct. 2 ¹⁹⁵⁶ Motion of pltf. to reinstate cause. c/m 10-1-56. fi 3
4. 1956 Oct 19 Order dismissing motion to reinstate for want of prosecution
(N.) Matthews 4
5. 1956 Oct. 22 Motion of pltf. to reinstate; c/m 10-20-56; M.C. 12-56 fi 5
6. 1956 Nov. 9 Order reinstating cause. (N) Matthews, J. 6
7. 1959 Jun. 17 Motion of pltf. to re-instate case on calendar. M. C. 6-18 59fi 7
8. 1959 Sep. 10 Order reinstating cause on calendar. (N) Holtzoff, J. 8
9. 1963 Oct. 4 Motion of pltf to reinstate; P&A. fi 9
10. 1963 Oct. 7 Order reinstating case. (N) Holtzoff, J. 10
11. 1969 Oct. 9 Order to show cause returnable Oct. 15, 1969 at 4:00 p.m. in
Courtroom No. 3, U.S. Courthouse, why case should not be dismissed.
Jones, J. 11
12. 1969 Oct. 16 Called, if service on deft. is not perfected by Dec. 31, (p. 47 of
1969, case to be dismissed without prejudice by Clerk on Dec. Appendix)
31, 1969. (Rep: P. Brockmeyer) Jones, J. 12
13. 1969 Dec. 18 Affidavit of Arthur Curtis in support of attachment before
judgment. Bond approved in sum of \$10,000.00. (fiat) Matthews, J. 12
14. 1969 Dec. 18 Attachment, Writs (4) & interrog (4) issued to Sears Roebuck
and Co. deposit by Curtis 13
15. 1969 Dec. 18 Attachment writs (4) & interrog (4) issued to Merrill, Lynch,
etc. Deposit by Curtis \$4.00 Served 12-18. ser. 12-22 14
16. 1969 Dec. 30 Motion of pltf. to transfer to U.S. Dist. Ct. for Southern (15;also
Dist. of N.Y.; P&A; Exhibits (5); M.C. fi at appendix,
42) 16
17. 1970 Jan. 13 Request of pltf. for admissions; c/m 1-12-70; exhibit. fi 16
18. 1970 Jan. 21 Motion of deft. to dismiss; exhibit A; c/m 1-21; fi (17;also
Appendix28) 17
19. 1970 Jan. 26 Opposition of pltf. to motion to dismiss; statement;
c/m 1-24-70 fi (Appendix
29) 19

FOUND AT.....

20. 1970 Feb. 16 Motion of Deft, to dismiss with Prejudice; P&A; exhibit A&B; (Appendix
c/m 2-16-70; M.C. fi p. 28)
21. 1970 Feb. 25 Objections of pltf. to recommendation of pretrial examiner; 20
c/m 2-21-70; M. C. fi
22. 1970 Feb. 25 Objections of pltf. to motion to dismiss; P&A; statement; (21, see
exhibits (8) c/m 2-23-70. fi Appendix
29)
23. 1970 Feb. 27 Opposition of deft. to objections to recommendation of 22
pretrial examiner; c/m 2-27. fi
24. 1970 May 14 Motion of pltf. for change of venue, argued and denied (Appendix
(Order to be presented); motion of deft. to dismiss argued and 42,43)
granted with prejudice (Order to be presented.) Pratt, J. (Transcript
at end of
Supp.
appendix)
25. 1970 May 19 Motion for rehearing denied (Fiat) (N) Pratt J. 24
26. 1970 May 22 Motion of pltf. to remove Judge Pratt from case; P&A; (25 for
notice; affidavit; c/s 5-22; M. C. fi affidavit;
Motion, p.11
Appendix)
27. 1970 May 26 Order granting deft's motion to dismiss with prejudice 26; Brief, 5
pursuant to Federal Rule 41 (b) (signed 5-25-70) (N) Pratt, J.
28. 1970 May 26 Order denying plft's motion for change of venue. (N) 27, Brief, p.5
(signed 5-25-70) Pratt, J.
29. 1970 Jun. 1 Hearing on motion to disqualify Judge heard and taken (no papers to
under d advisement. Curran, C. J. reproduce)
30. 1970 Jun. 26 Order denying plft's motion to remove Judge Pratt 29; also
from this case, to send the case to Judge Waddy and to send Brief, p.3
the case to New York. C/S 2/25/70 fi

U. S. MARSHAL'S RETURN OF SERVICE

United States of America
4545 Conn
DISTRICT OF COLUMBIA

Supplementary
Appendix
p. 1

Curtis

Clerk's No. 3579-55

vs.

U. S. Marshal No.

John C. and B. B. Belling

Received by U. S. M. (Date and time)

I hereby certify and return that I served the annexed Summons & Complaint
on the therein-named John C. and B. B. Belling, a corporation
(Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with Mrs. Wm. M. Edson
by authorization of Plaintiff
personally at 4545 Conn Ave apt 506 in the said District
(Address—Street number, apartment number) (City)
at 8:15 a.m.—p. m., on the 8 day of December, 1955

Marshal's fees 1.00

Mileage

Carlton S. Brack
United States Marshal
By George L. Smith
Deputy

FILED

DEC 9 - 1955

HARRY M. EDL, Clerk

I hereby certify and return that I served the annexed _____
(Write)
on the therein-named _____
(Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with _____

personally at _____ in the said District
(Address—Street number, apartment number)

ARTHUR S. CURTIS
4/5 A. S. CURTIS PICTURE SYNDICATE
1010 P STREET, N. W.
Washington, D. C.

Plaintiff

vs.

FOOTE, CONE, AND BELDING
Room 622, 711 14th St., N. W.
Washington, D. C.

Defendant

FILED
D. C. 2
C. A. NO. 3529-55

MOTION FOR DEFAULT JUDGMENT

Comes now plaintiff and moves this Court for entry of judgment in default of answer or other proper pleading by defendant within time specified in the summons.

Carl L. Shipley

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed to Foote, Cone, and Belding, C/o Wm. D. McAdams, 4545 Connecticut Ave., N. W., a copy of the foregoing.

Carl L. Shipley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A. S. CURTIS

Plaintiff

v.

FOOTE, CONE AND BELDING

Defendant

C.A. NO. 3529-55

FILED

OCT 2 - 1955

HARRY E. ROLL, Clerk

MOTION TO REINSTATE

Comes now plaintiff and moves this court for an order reinstating the above entitled action which was dismissed pursuant to Local Rule 13 for failure to prosecute as of September 6, 1956, and for good cause plaintiff states:

1. Defendant was personally served on December 12, 1956
2. Defendant did not answer or take other action within time
3. On March 7, 1956, plaintiff filed a motion for default judgment
4. Through clerical error a motions card was not filed and the matter never came on for hearing and no entry of default was ever made

WHEREFORE, the premises considered, it is respectfully submitted that dismissal for failure to prosecute will result in a miscarriage of justice and deprive plaintiff of a fair opportunity to present his case.

October 1, 1956


Carl L. Shipley

United States District Court
for the District of Columbia

S.A. 4

FILED

OCT 19 1956

HARRY M. HULL, Clerk

ARTHUR S. CURTIS t/a

A.S. CURTIS FEATURE SYNDICATE

Plaintiff

vs.

FOOTE, CONE and BELDING, a Corp.

Defendant

CIVIL No. 3529-55

ORDER DISMISSING MOTION

This cause being duly assigned for hearing upon the motion to reinstate filed herein October 2, 1956, the same having been called this 18th day of October, 1956, and no response thereto by either party.

IT IS BY THE COURT, ordered that the said motion to reinstate be, and the same hereby is, dismissed for want of prosecution.

JUDGE

Dated October 19, 1956.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Supp.
App. p. 5

A. S. CURTIS

Plaintiff

v.

C. A. NO. 3529-55

FOOTE, CONE AND BELDING

Defendant

FILED

OCT 22 1956

HARRY E. EDL, CLERK

MOTION TO REINSTATE

Comes now plaintiff and moves this court for an order reinstating the above entitled action which was dismissed pursuant to Local Rule 13 for failure to prosecute as of September 6, 1956, and for good cause plaintiff states:

1. Defendant was personally served on December 12, 1955
2. Defendant did not answer or take other action within time
3. On March 7, 1956, plaintiff filed a motion for default judgment
4. Through clerical error a motions card was not filed and the matter never came on for hearing and no entry of default was ever made

WHEREFORE, the premises considered, it is respectfully submitted that dismissal for failure to prosecute will result in a miscarriage of justice and deprive plaintiff of a fair opportunity to present his case.

Carl L. Shipley

October 20, 1956

FILED

NOV 9 - 1956

Day 1 Day 2 Day 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

A. S. CURTIS

Plaintiff

VS.

C. A. NO. 3529-55

FOOTE, CONE & BELDING

Defendant

ORDER

Upon consideration of plaintiff's motion to reinstate the above matter and the points set forth therein, it is by the Court this 9th day of November, 1956,

ORDERED, that the above entitled cause for action be and hereby is reinstated on the calendar.

Judge

CERTIFICATE OF SERVICE

A copy of the foregoing order has been mailed this 7 day of November, 1956, to Foote, Cone and Belding, Room 622, 711 14th St., N.W., Washington, D. C. --

Carl L. Shipley

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS
816 National Press Bldg.,
Washington 4, D.C.
Plaintiff

Supp. App. p. 7
Civil Action No. 3529 - 55

vs

Foots, Cone and Belding,
Defendant

Motion to reinstate case on calendar

FILED

JUN 17 1955

HARRY M. HULL, Clerk

Plaintiff moves this Court to reinstate the above-entitled case on the Calendar and gives the following reasons:

1. This case was filed in 1955, and Plaintiff has made every effort to serve defendant since then, including having special process server present where the President of the Defendant company was publicly scheduled to be present, but in all such cases the Defendant did not appear. Plaintiff believes Defendant is in this jurisdiction but is secreting himself, or itself.
2. Since first filing of this case, the Clerk's office has always notified Plaintiff when the time was running on this case under Rule 13. However, this time, Mrs. Benduri has stated to Plaintiff, upon inquiry, that she failed to give such notice to Plaintiff. Meanwhile, Plaintiff, having been struck by an automobile, has had difficulty keeping track of all of his affairs for the time being and is still under treatment.
3. Failure to grant this request will mean that Plaintiff will be required to file a new action, paying extra money, and thus add to the cost of litigation.

WHEREFORE, the premises considered, Plaintiff moves this Court to reinstate the above entitled case on the calendar so that Plaintiff may endeavor to serve Defendant in accordance with the rules of this Court.

Respectfully submitted,

Arthur S. Curtis
Arthur S. Curtis

Arthur S. Curtis,

Plaintiff

vs

FOOTE, CONE and BELDING,

Defendant

Civil Action No. 5529-55

ORDER REINSTATING CASE

Supp.
App. p. 8

SEP 10 1959

SEP 10 1959

Upon motion properly made by Plaintiff Arthur S. Curtis, for good cause shown, and upon papers read, praying that the above entitled case be reinstated ^{on} to the Calendar, it is hereby

ORDERED, that the above entitled case be, and hereby is, reinstated ^{on} to the Calendar.

Alexander Hollingsworth
Judge, U.S. District Court
for the District of Columbia

Arthur S. Curtis, Attorney
pro se

816 National Press Building
Washington 4, D.C.

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed, postage prepaid, a copy of this order to Foote, Cone and Belding, c/o Carl Byoir, National Press Building, Washington 4, D.C.

Date 23 July 1959

Arthur S. Curtis, Pro se
A member of the Bar of this Court
816 National Press Bldg. D.C. 4

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,
Plaintiff

vs.

FOOTE, COKE AND BELDING,
Defendant

Civil No. 3529-55

Supp. App. p. 9

FILED

OCT 4 1953

HARRY M. HULL, CLERK

MOTION TO REINSTATE

Plaintiff moves this Court to reinstate the above entitled case which was dismissed under Rule 13. In support of this motion, plaintiff states as follows:

1. Plaintiff took a brief vacation this year for the first time in a number of years and was detained by sudden legal matters elsewhere.
2. The Clerk's Office failed to give the 30-day notice, and therefore plaintiff's secretary was unable to inform the plaintiff that action should be taken. Plaintiff in fact relied upon the Clerk of Court to notify him before dismissal.
3. Plaintiff has had a number of pressing matters including an emergency legal matter involving a client in the hospital and therefore under Rule 6CB requests special consideration for excusable neglect.
4. The Court will see that this case has been kept alive by plaintiff since 1955 and plaintiff is entitled to a trial on the merits.

Wherefore the plaintiff respectfully moves this Court to reinstate this case.

Respectfully,

A. S. Curtis

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,
Plaintiff

Supp. App. p. 10

versus

Civil Action No. 3529-55

FCOTE, CONE AND BELDING,
Defendant

FILED

OCT 7 1953

HARRY M. HULL, CLERK

ORDER

This cause came on to be heard before this Court upon written motion of Plaintiff asking that this case be reinstated after dismissal under local rule 13.

Upon papers read, and after due deliberation, it is this 7 day of October 1953,

ORDERED, that this case is reinstated.

Alexander Holtzoff
United States District Judge

Entered: _____

Supp. App. II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR CURTIS t/a)
A. S. CURTIS FEATURE SYNDICATE)
v.)
FOOTE, CONE AND BELDING, INC.)

C. A. No. 3529-55

TO

Arthur S. Curtis
National Press Building
Washington, D. C. 20004

FILED

OCT 9 1969


ROBERT M. STEARNS, Clerk

RULE TO SHOW CAUSE

You are directed to appear before me on October 15, 1969, at 4:00 P. M., in Courtroom No. 3, U. S. Courthouse, 3rd and Constitution Ave., N. W., to show cause why this action should not be dismissed.

Dated:

October 9, 1969


WILLIAM B. JONES, Judge

Supp. App. p. 12

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

OCT 20 1969

ARTHUR CURTIS
t/a A.S. Curtis Feature Syndicate
Plaintiff

v.

FOOTE, CONE AND BELDING, INC.
Defendant.

ROBERT M. STEARNS, Clerk

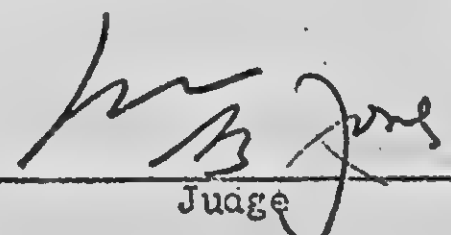
Civil Action

No. 3529-55

ORDER

Upon consideration of the Order to Show Cause
issued on October 9, 1969, and counsel for the
plaintiff being present, it is by the Court this 20th
day of October, 1969,

ORDERED that if service on the defendant is not
perfected by December 31, 1969, the cause shall be
dismissed without prejudice by the Clerk on that
date.


Judge

Arthur S. Curtis, being first duly sworn, on his oath deposes and says: That he is the plaintiff in the above entitled action, and has personal knowledge of the facts hereinafter set forth.

That plaintiff has a just right to recover in the cause of action above-mentioned, which is as follows:

1. The parties entered into a contract under which plaintiff agreed to make a confidential disclosure to defendant of certain advertising and promotional ideas and presentations. The contract was to the effect that defendant would pay plaintiff if any part of plaintiff's ideas or presentations were used in any way by defendant.

2. Defendant subsequently did in fact make use of all or part of the advertising and promotional ideas and presentations disclosed to it by plaintiff, but defendant refused to pay as agreed.

3. As part of the unauthorized and unpaid for usage, defendant distributed over 1,000,000 matrices and reproduction copies to publications, the contract value to plaintiff of which would be at least \$1. each. *The value of the property is \$5,000.*

4. Plaintiff further states that the defendant is a non-resident corporation, that it had offices here, that it closed its offices upon filing of this suit, that it still evades the service of ordinary process; and that defendant has assigned, conveyed, disposed, or secreted a certain portion of its property with intent to hinder, delay or defraud its creditors particularly the undersigned.

Subscribed and sworn to before me this ____ day of December 1969. My commission expires:

In the United States District Court for the
District of Columbia

ARTHUR S. CURTIS

Plaintiff

vs.

Foots, Cone and Peising, a corporation

Defendant

Supp. App. 13 (a.)

35292

C.A. 3925-55

Civil Action No.

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the defendant lands and tenements, property and credits which shall be found in this District, to the value of \$ 2,500. with interest

being the amount of the plaintiff demand against the defendant, as shown by his affidavit, and claimed in his complaint, and the further sum of \$ _____, for the costs and charges which may accrue in the premises; and the same so attached, safely keep, subject to the orders of the Court, unless the defendant or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety or sureties to abide by and perform the judgment of the Court in relation to said property. And should you attach the defendant's property or credits in the possession of any other person or persons than the defendant you shall notify such person or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them as well as on said defendant, to appear in said Court on or before the twentieth day, exclusive of Sundays and legal holidays, accruing after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the

18th

of day December, A. D. 1919

ROBERT M. STEARNS, Clerk.

(By)

Deputy Clerk.

NOTICE

19

To Foots, Cone and Peising, a corporation, Defendant,
Sears, Roebuck and Company, a corporation, Garnishee.

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of the foregoing Writ of Attachment in the hands of _____, Garnishee, (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

MARSHAL'S RETURN

Attached as per schedule herewith and served defendant, with a copy of this Writ and Notice pre-

United States District Court for the District of Columbia

Supp. App. 13(6)

ARTHUR S. CURTIS

3529

C.A. NO. 3925-55

Plaintiff

vs.

Footc, Cone and Belding, a corporation

CIVIL

MUNICIPAL

Court No.

Defendant

NOTICE

To Sears Robuck and Co. (serve John Wheeler Vice Pres. 1211 Conn. Ave. N.W. D.C.) Garnishee :

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Attorney for Plaintiff

INTERROGATORIES

ARTHUR S. CURTIS
ATTORNEY AT LAW

NATIONAL TRUST BUILDING

536

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount? By you is meant your national corporation, Chicago and New York.

ANSWER:

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what? Same explanation as above.

ANSWER:

In the United States District Court of the
District of Columbia

ARTHUR S. CURTIS

Plaintiff,

vs.

Foote, Cone and Belding, a corporation

Defendant.

C.A. 8025-55

Civil Action No. _____

THE PRESIDENT OF THE UNITED STATES, TO THE MARSHAL FOR SAID DISTRICT, GREETING:

You are hereby commanded to attach, seize, and take into your custody the defendant lands and tenements, property and credits which shall be found in this District, to the value of \$ 2,500. with interest

being the amount of the plaintiff demand against the defendant, as shown by his affidavit, and claimed in his complaint, and the further sum of \$ _____, for the costs and charges which may accrue in the premises; and the same so attached, safely keep, subject to the orders of the Court, unless the defendant or the person in whose possession the property is attached, deliver to you, to be filed herewith, his undertaking, with sufficient surety or sureties to abide by and perform the judgment of the Court in relation to said property. And should you attach the defendant's property or credits in the possession of any other person or persons than the defendant you shall notify such person or persons of such seizure by virtue of this Writ of Attachment, and serve a notice upon him or them as well as on said defendant, to appear in said Court on or before the twentieth day, exclusive of Sundays and legal holidays, accruing after the service of said notice, to show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had.

WITNESS, The Honorable Chief Judge of said Court, the

of day _____, A. D. 1914

ROBERT M. STEARNS, Clerk.

(By) _____

Deputy Clerk.

NOTICE

To ☒ Foote, Cone and Belding, a corporation, Defendant
Sears, Roebuck and Company, a corporation, Defendant
(serve John Wheeler, Vice Pres. 1211 Conn. Ave. NW, D.C.), Garnishee.

You are hereby notified to appear in the District Court of the United States for the District of Columbia on or before the twentieth day, exclusive of Sundays and legal holidays, after service hereof, and show cause, if any there be, why the property, credits, of the said defendant, seized by virtue of the foregoing Writ of Attachment in the hands of _____, Garnishee, (of which seizure the said garnishee is hereby notified), should not be condemned and execution thereof had.

U. S. Marshal.

United States District Court for the District of Columbia

ARTHUR S. CURTIS

, Plaintiff

vs.

foote, Cone and Belding, a corporation

, Defendant

Supp App p. 14(2)

352

C.A. NO. 3925-55

CIVIL

MUNICIPAL

Court No.

NOTICE

To Sears Roebuck and Co. (serve John Wheeler Vice Pres. , Garnishee :

1211 Conn. Ave. N.W. D.C.)

You are required to answer the following interrogatories, under oath, within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

Attorney for Plaintiff

ARTHUR S. CURTIS
ATTORNEY AT LAW

NATIONAL PRESS BUILDING
WASHINGTON, D. C. NA. 8-5696

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment, served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant ? If so, how, and in what amount? By you is meant your national corporation, Chicago and New York.

ANSWER:

2d. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what? Same explanation as above.

ANSWER:

DEC 30 1969

19A15(a)

ROBERT M. STEARNS, Clerk
The Plaintiff respectfully moves this Court to transfer this case
to the Southern District of New York (New York City), for these reasons:

1. That 28 U.S.C. 1404 (a) reads as follows:

"For the convenience of parties and witnesses,
in the interest of justice, a district court
may transfer any civil action to any other
district or division where it might have been brought."

2. That in 1955 when this suit was filed in this Court, the principal
office of the defendant was in New York City, at 347 Park Avenue, and that
its principal office is still in New York City, where it now rents more
than two full floors in the Pan Am building at 200 Park Avenue.

3. That in 1955 when this suit was filed in this Court, defendant
rented an office at 711 14th St. N.W., D.C. and did business in the
District of Columbia; and that Plaintiff made numerous attempts to serve
defendant, all without success; that defendant then closed its D.C. office
rather than appoint a registered agent as required by the then-new statute.

4. That since 1955, numerous attempts have been made to serve defendant
as is reflected on the docket sheet.

5. That service by attachment before judgment has finally been effected
by serving two of defendant's clients in this area, Sears, Roebuck Co.,
and Merrill, Lynch, Pierce, Fenner and Smith, through the use of a special
process server, James Dodd, Esquire, a member of the bar of this Court,
who was appointed by special order of Chief Judge Curran.

6. That as part of the Attachment Before Judgment, and as an alternative
to publication against defendant, Plaintiff personally travelled to New
York and the United States Marshall there personally served copies of the
Attachment Before Judgment upon the defendant at its New York offices, on

is shown by the papers in this case and copies of which are attached hereto, which is attached hereto.

SA 15(b)

7. That there was filed on 25 December 1969 in the Southern District of New York (New York City), a suit by plaintiff against defendant, identical to the present suit, and that the defendant has already been served in New York with copies of this suit, Civil Action 69 - 3418, as is shown by the U.S. Marshall's return, reproduced herewith as an exhibit.

8. That the parties are now litigating in two jurisdictions, here and in New York, over the same case.

9. That Plaintiff has employed astute counsel in New York to represent him, one Stanley M. Estrow, age 60, who has spent his legal life in the publications, advertising, and graphic arts fields; and, that defendant has legal counsel in New York as well.

10. That Plaintiff is no longer a resident of the District of Columbia; and that he is required, as a matter of reentering the publishing business, to make frequent business trips to New York.

11. That on best knowledge and belief, all or almost all of the witnesses in this case are in New York.

12. That it is presently more convenient to both parties to have this case transferred to New York, and more convenient also to the witnesses, particularly if the two cases were consolidated there, so that in one litigation there might be brought about the resolution of their differences without the excessive cost of overlapping and duplication in discovery, witnesses, and trials.

13. That it would be in the interest of justice to transfer this case to New York, to avoid the expenses and loss of time described in 12, above.

14. That this Court has authority under 28 U.S.C. 1404 (a) and the cases decided thereunder, to grant the relief requested.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

8-A, 15(a)

ARTHUR S. CURTIS

PLAINTIFF

vs.

FOOTE, CONE, AND BELDING, INC.,

DEFENDANT

CIVIL ACTION NO. 3529-55

REQUESTS FOR ADMISSIONS UNDER
FRCP NO. 36

In accordance with FRCP No. 36 the Plaintiff requests that the Defendant admit that the following facts are true and that the documents referred to are genuine.

1.

That the letter to the Plaintiff, marked 1 (Exhibit A), is a genuine copy of the original letter written to the Plaintiff by the Defendant through its authorized agent as shown on the letter itself.

2.

That the defendant retains, or in the past has retained, a library, file, record room, or other repository of ideas and program submissions made to the agency.

3.

That the statements made in the attachment to, namely that the Defendant came to the Treasury Department with the suggestion of a Treasury Bond Program using Medal of Honor winners, is true.

4.

That the suggestion by the Defendant to the Treasury Department, described in 2 above, came subsequent to the time that the Plaintiff submitted to the Defendant the ideas or programs described in Exhibit 1.

5.
That the Defendant in 1955 had an office at 711 14th Street, N.W., Washington, D.C. from which it rendered certain services to its advertising clients.

S.A.
16(b)

6.
That the program suggested by the Defendant to the Treasury Department was carried out by the Defendant.

7.
That as part of carrying out the program described above, the Defendant caused to be produced and sent to the publications more than one million matrices or reproduction proofs for use in reproducing the copy produced by or under the direction of the Defendant as part of the Medal of Honor Bond Series for the Korean War.

8.
That as a result of the program described in 6 above, the Defendant received certain commissions, rebates or other financial benefits.

9.
That as a result of the program or allied programs described in 6 above, the Defendant received some benefits.

10.
That the Defendant by and through Fairfax Cone, Robert Carney, Coudert Brothers, and other officers, agents, servants or employees, has known of the pendency of this suit and the claims of this Plaintiff since at least 1957.

11.
That Fairfax Cone was informed by telephone when service was made personally upon one William McAdams in approximately 1955.

12.
That at the time service was made upon the said William McAdams, the said William McAdams was still the agent, servant or employee of the Defendant.

13.

That the Defendant closed its office in Washington, D.C. subsequent to the time that this law suit was first filed and has not reopened its Washington office since that time.

S. A.
16(c)

14.

That the Defendant has not had since 1953 a registered agent upon whom services can be made in Washington, D.C.

15.

That from the year 1945-1949 the Defendant subscribed to the Boston Globe, the Pittsburgh Press, and the Seattle Times.

16.

That from 1945-49 the Defendant placed advertising for its clients in the Boston Globe, the Pittsburgh Press or the Seattle Times.

17.

That officers or responsible executives of the Defendant knew of the appearance and periodic publication of the Plaintiff's work entitled Medal of Honor in the Boston Globe, the Pittsburgh Press and the Seattle Journal from 1945-1949.

18.

That some of the officers or responsible executives of the Defendant who knew of the Plaintiff's above described work, were still employed by the Defendant when it produced the Treasury series of Medal of Honor winners.

19.

That the Defendant was sued for wrongfully using the Smokey the Bear idea, theme, or program, by one who allegedly originated same, and that judgment was rendered against the Defendant in that suite.

20.

That the Defendant customarily pays for ideas and programs which are submitted to it by non-employees and non-agents, if it uses the ideas or programs in whole or in part.

21.

S.A. 16(L)

That in considering the idea, ideas, program or programs described in No. 1, Exhibit A attached it was expressly agreed between the parties that the Defendant would pay the Plaintiff for any use made by the Defendant of the Plaintiff's presentation(s).

22.

That there was an understanding between the parties to this suit that if the Defendant used the Plaintiff's presentation(s), the Defendant would pay money to the Plaintiff.

23.

That the Defendant has in its possession or under its control a file on the plaintiff and the matters out of which this suit arises and that this file includes:

- a) A copy of the complaint in this case which has been there prior to 1969
- b) A copy of the letter served with this notice to admit facts, signed by Defendant's Vice President which has been in the file prior to 1969
- c) Memoranda relative to the matters out of which this case arise, which comment on the Plaintiff and his claims, which memoranda have been there prior to 1969
- d) Other papers relevant to the facts out of which this case arises.

24.

That the Plaintiff has in its possession or under its control a file which shows:

- a) The alleged origins of the program which the Defendant submitted to the Treasury Department and which became the War Bond program

- b) The presentations made to the Treasury Department
- c) The replies and responses with the Treasury Department
- d) Correspondence relating to the Treasury program
- e) The specific ideas in their embodied form which were used in the Treasury program
- f) The extent of use of the presentation provided by Defendant for the Treasury program
- g) Financial information relative to the Treasury program showing
- 1) extent of use
 - 2) cost of ads
 - 3) expenditures
 - 4) commissions, rebates, other financial benefits
 - 5) payments for production costs
 - 6) results of the program
 - 7) yearly statements for the above or any of them.

S.A. 16(2)

ARTHUR S. CURTIS, ATTORNEY FOR PLAINTIFF
816 National Press Building, DC 20004
NA 8-5696

CERTIFICATE OF SERVICE:

This is to certify that I have

this 12th day of January 1970
personally delivered a copy of
the foregoing to Counsel for
Defendant, Coudert Brothers
Attorneys, 1815 H Street, N.W.

[Sgry. App. p17.]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS
816 National Press Building
Washington, D. C. 20004,

Plaintiff,

v.

FOOTE, CONE & BELDING, INC.
200 Park Avenue
New York, New York 10017,

Defendant.

Civil Action
No. 3529-55

FILED
JAN 22 1970
ROBERT M. STEADMAN, Clerk

DEFENDANT'S MOTION TO DISMISS

Comes now the Defendant, FOOTE, CONE & BELDING, INC.,
by its attorney, Milo G. Coerper, Esq., and moves the Court
to dismiss this action without prejudice, pursuant to the
Court Order filed in this action on October 20, 1969, on
the grounds that Plaintiff has not perfected service on
the Defendant by December 31, 1969, as required by said
Court Order, copy of which is attached hereto as Exhibit A.

OF COUNSEL:


Milo G. Coerper

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Supp. App. 7-26-1
FILED

FEB 27 1970

ROBERT M. SLEARN, Clerk

ARTHUR S. CURTIS
816 National Press Building
Washington, D. C. 20004,

Plaintiff,

Civil Action
No. 3529-55

v.

FOOTE, CONE & BELDING, INC.
200 Park Avenue
New York, New York 10017,

Defendant.

OPPOSITION TO PLAINTIFF'S OBJECTIONS
TO RECOMMENDATION OF PRETRIAL EXAMINER

The Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., in support of its Opposition to Plaintiff's Objections to Recommendation of Pretrial Examiner and pursuant to Local Rule 9(i)(2) states as follows:

1. The matters under consideration were set down for hearing before the Pretrial Examiner on February 6, 1970, at 10:00 A.M. Attorney for Defendant was present when the Pretrial Examiner, Mr. Finn, received a call from the Plaintiff stating that he had Court commitments elsewhere and could not attend.

2. These matters were then set once again for hearing before the Pretrial Examiner on February 20, 1970, at 9:30 A.M. Defendant's attorney was present. At this time,

Supp. Opp. 2c(b)

the Pretrial Examiner, Mr. Finn, acted on the Motions for Enlargement of Time, partially on the basis of the failure of counsel for Plaintiff to appear. Counsel for Defendant has verified with Mr. Finn that he did not receive any call from the Plaintiff explaining his failure to appear at this second Pretrial Hearing on February 20, 1970.

OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017
and
One Farragut Square South
Washington, D. C. 20006

Respectfully submitted,

Milo G. Coerper

Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1970, I served the above Opposition to Plaintiff's Objections to Recommendation of Pretrial Examiner, by mailing a copy of same to ARTHUR S. CURTIS, the Plaintiff in this action, who is acting on his own behalf, at 816 National Press Building, Washington, D. C. 20004, in a properly addressed, postage paid, envelope.

M. O. O.

OBJECTIONS TO
RECOMMENDATION OF PRETRIAL EXAMINER

5.11.37

The Plaintiff objects to the recommendations of the Pretrial Examiner for the reasons stated below:

1. Pretrial Hearing was set at the same time when undersigned Counsel had Court commitments elsewhere, and the pretrial office was so informed. Undersigned Counsel further informed the pretrial office that he would come as soon as his Court appointment was completed or alternatively, that he would submit the matter if the Pretrial Examiner preferred not to reset.

The Pretrial Examiner recommends the allowance of the Defendant's motions on the ground that undersigned Counsel failed to appear. This implies lack of interest or negligence which do not fit the facts. Counsel is vitally interested in this Case since he is the Plaintiff. For that very reason he could not give himself a preference over his other clients, and had to place himself last. The Court should be informed of this lest the Case be discolored.

The above objection applies to the following motions:

1. Plaintiff's request for admissions;
2. Defendant's motion for enlargement of time to respond to Plaintiff's motion for a change of venue;
3. Defendant's motion for enlargement of time to respond to Plaintiff's motion for judgement by default.

Respectfully,

Certificate: Arthur S. Curtis
I have this 21st February 816 National Press Building
1970 mailed postage prepaid Washington, D. C. 20004
a copy of this pleading
to opposing Counsel.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS
816 National Press Building
Washington, D. C. 20004,

Plaintiff,

v.

FOOTE, CONE & BELDING, INC.
200 Park Avenue
New York, New York 10017,

Defendant.

Civil Action
No. 3529-55

SA22(a)

OPPOSITION TO PLAINTIFF'S OBJECTIONS
TO RECOMMENDATION OF PRETRIAL EXAMINER

The Defendant, FOOTE, CONE & BELDING, INC., by its attorney, Milo G. Coerper, Esq., in support of its Opposition to Plaintiff's Objections to Recommendation of Pretrial Examiner and pursuant to Local Rule 9(i)(2) states as follows:

1. The matters under consideration were set down for hearing before the Pretrial Examiner on February 6, 1970, at 10:00 A.M. Attorney for Defendant was present when the Pretrial Examiner, Mr. Finn, received a call from the Plaintiff stating that he had Court commitments elsewhere and could not attend.

2. These matters were then set on once again for hearing before the Pretrial Examiner on February 20, 1970, at 9:30 A.M. Defendant's attorney was present. At this time,

SA 22(b)

the Pretrial Examiner, Mr. Finn, acted on the Motions for Enlargement of Time, partially on the basis of the failure of counsel for Plaintiff to appear. Counsel for Defendant has verified with Mr. Finn that he did not receive any call from the Plaintiff explaining his failure to appear at this second Pretrial Hearing on February 20, 1970.

Respectfully submitted,

OF COUNSEL:

COUDERT BROTHERS

200 Park Avenue
New York, N. Y. 10017
and
One Farragut Square South
Washington, D. C. 20006

Milo G. Coerper
One Farragut Square South
Washington, D. C. 20006
(Telephone: 783-3010)

Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February, 1970, I served the above Opposition to Plaintiff's Objections to Recommendation of Pretrial Examiner, by mailing a copy of same to ARTHUR S. CURTIS, the Plaintiff in this action, who is acting on his own behalf, at 816 National Press Building, Washington, D. C. 20004, in a properly addressed, postage paid, envelope.

Milo G. Coerper, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS,

PLAINTIFF

VERSUS

FOOTE, CONE AND BELDING

DEFENDANT

C.A. 3529-55

MOTION FOR REHEARING

FILED
MAY 18 1970
ROBERT M. STEARNS, Clerk

Supp. app p 21

Plaintiff respectfully requests a rehearing on the Motion to Dismiss for the reason that the Court overlooked the pleadings, which show that the Defendant made a General Appearance when Defendant responded for the Motion For Judgment by Default, etc. The Court did not mention these pleadings and the appearance in the Court's opinion, which clearly shows that the Court overlooked this phase of the case. If the Court recognizes that there was a general appearance, as the papers clearly show on their face, then plaintiff has clearly succeeded in gaining jurisdiction over the person of defendant.

Further, if in the Court's opinion Defendant is not personally before the Court, then Plaintiff is entitled to a Judgment of Condemnation in the sum of \$5,000. for the property attached before judgment, and Plaintiff so prays for this relief.

The Court has been too much concerned over the age of the case and not enough with the fact that justice was finally at hand for the plaintiff. The public pays for the Courts in order to ensure that everyone shall have his day in Court, and each person has a constitutional right to a fair hearing.

The Court erred in failing to disqualify itself from further hearing, and it is respectfully recommended that it should vacate its findings and refer the case back to Judge Waddy.

Plaintiff made an appearance when he made his motion to dismiss,"

14 May 70

FILED

2.A 25(a)

AFFIDAVIT OF BIAS

Comes now the Plaintiff in this case, Arthur S. Curtis, and on the basis of the affidavit set forth below, and the reasonable conclusions that can be drawn from it, respectfully requests that Judge Pratt be removed from this case, that any rulings made by him be voided, and that the case be sent back to Judge Waddy, who heard the case earlier, and made statements as to the proper disposition of the case, and retained jurisdiction thereof, but somehow did not succeed in retaining the case to final disposition, or be similarly disposed of by Chief Judge Curran.

The Motion in this case could not be based upon 28 USC #144, because #144 requires filing ten days before the hearing, and affiant had no knowledge before the day of the hearing that a prejudice existed; but upon the inherent powers of this Court and inherent Constitutional rights of the Plaintiff to have his case not heard where the case is improperly before a tribunal where a tribunal is not impartial, or where he reasonably suspects that the tribunal might not be impartial, so that he reasonably concludes that a fair trial on the merits will not be forthcoming.

Further grounds for this Motion is the inherent powers of this Court and the Chief Judge to transfer a case from one Judge to another in the interests of justice where the party reasonably feels that he has not had, or will not have a fair hearing.

25(b)

The affidavit is as follows:

1. That the Plaintiff filed this case in 1955 and attempted service on the Defendant at its office at 711 14th Street, N. W., but found the door locked.
2. That the Plaintiff succeeded in obtaining personal service upon one William McAdams, at 4545 Connecticut Avenue, N. W., by training an attorney, and the local representative of the Defendant, but was unable to obtain the cooperation of Mr. McAdams in bringing him before the Court for a hearing in those years inasmuch as Mr. McAdams was then receiving approximately \$1,000 per week from Defendant.
3. That thereafter from 1955 to 1969, the Plaintiff made numerous attempts to serve the Defendant or its agents here in the District, all without success, and the case was dismissed and reinstated several times.
4. That in October of 1969, Judge Jones gave the Plaintiff until the end of the year to effect service on the Defendant and stated in his Order that unless service was perfected the case would be dismissed without prejudice.
5. That the Plaintiff thereupon obtained a list of the Defendant's customers in Washington D. C., and attached

25(c)

before Judgment as to these in the sum of \$5,000, and that Sears Roebuck and Company has answered and stated that it has funds available on hand of at least \$2,500.

6. That the Plaintiff, in December of 1969, filed an original suit against the Defendant in New York City and obtained personal service on the Defendant, which has since answered the Summons and Complaint in New York. Plaintiff was served personally at the Court in New York with copies of the attachment before Judgment by way of giving personal notice to the Defendant of the attachments before Judgment in this area. In order to gain permission to attach before Judgment, the Plaintiff secured the signature of a Judge of the Court, and also posted bond in the sum of \$10,000, and paid various fees for marshalls as well as the services of a special process server.

7. That William McAdams now came forward with an affidavit, which is a paper in this case, in which he admits that at the time he was personally served, he was in fact the representative of the Defendant, that he did in fact telephone the president of the Defendant's corporation and that at the suggestion of the latter did send a copy of the Complaint to the latter.

8. That in December of 1969, the Plaintiff filed a S.A. 252 Motion for a change of venue based upon 28 USC 1404 (A), and shortly thereafter filed a Motion for Judgment by Default based upon the affidavit of William McAdams, and filed other papers.

9. That the Defendant, through local counsel, filed papers in the case objecting to the Motion for Judgment by Default and objecting to the change of venue, requesting various continuances, and finally filing a Motion to dismiss both with and without prejudice.

10. That the case came on to be heard before Judge Waddy on the 18th day of March, 1970, who made the following statements:

"It appears to me that inasmuch as there is a pending case in New York which I understand to be on all fours, and where there is no question about service, that this case ought to be transferred and, if the New York Court sees fit to dismiss in the light of their Statute of Limitations, then many of these things would be disposed of." (p. 4)

"Well I don't think it would be proper for this Court to dismiss with prejudice where other judges of this Court have from time to time reinstated this case. I certainly would be saying that the other judges were wrong in reinstating the case on those occasions when they reinstated the case and I do not think it would be proper for me to do such."

(p. 5)

"I will retain jurisdiction of this case and the Motions Clerk will set it down for the first available date after 1st April --- although I will not be sitting in Motions Court, I will retain jurisdiction."

(S.A.25f)

(P.N)

11. That thereafter the case was set for hearing in front of Judge Waddy in April of 1970, but the Court was not in session on that day because of the death of a wife of one of the Judges of the Court.

12. That the Plaintiff was then informed that the case would be heard by Judge Pratt instead of Judge Waddy.

13. That the Plaintiff paid the Court Reporter \$19.50 to prepare a copy of the proceedings of March 18, 1970, so that Judge Pratt would have the benefit of the observations of Judge Waddy, and the Plaintiff further checked with the Judge's secretary Miss McTierney to inform her that the transcript had been prepared by Mrs. Blair with papers in the case and to suggest that she be certain that Judge Pratt had this available to him.

14. That at the hearing on Thursday, May 14, 1970, the Plaintiff entered the Courtroom and heard the clerks discussing the fact that there was a "1955 case in Court today." Plaintiff asked one of the clerks, "Is that bad?" and received a reply of the nod of a head.

15. That Judge Pratt then took the bench and made S.A. 25(2) statements substantially to the effect that he was to hear a case which was one of the greatest travesties ever to be foisted on the Court, that approximately eight Judges had spent their time with it, that over twenty U. S. Marshalls had tried to serve the papers, that the "buck stops here," and that he would hear only two motions today, the motion for a change of venue, and the motion to dismiss.

16. That there were in fact pending before the Court numerous other Motions, including the Motion for Judgment by Default, which had been filed prior to the Motion to Dismiss.

17. That the Plaintiff was taken by surprise and did not know what to do, particularly since the Judge ordered that the case proceed. Plaintiff thereupon asked the Court to hear only the Motion for a change of venue at that time because he was to be at the White House and should be there by 10:30. The Plaintiff also stated to the Judge that it was the Plaintiff's conception that if the case were sent to New York on the Change of Venue Motion, the other Motions would not need to be heard. Thereupon the Motion for Change of Venue was argued and denied and Plaintiff requested until 1:30 to argue the Motion to Dismiss.

18. That at 1:30 the Plaintiff addressed the Court and requested information as to whether the Court had seen the transcript of the record before Judge Waddy dated March 18, 1970, and the Judge replied that he had not. The Plaintiff then read to him the pages which are quoted above and meanwhile Miss Vaughan, the Courtroom Clerk, obtained the transcript and handed it to the Judge. 8A25h

19. The Plaintiff thereupon argued and moved that the Court disqualify himself from the case for the reason that the Plaintiff did not believe that he had or would receive a fair hearing, and that the Court had formed a prejudice towards this case and therefore towards the Plaintiff for filing it, and that this was evidenced at least in part by the Court's opening statement that the Court would hear, "Two motions, only." of the numerous motions that were pending, which reasonable men could infer would mean that he had made up his mind in advance to deny the first motion and to grant the second motion, the first being the motion for a change of venue and the second being the motion to dismiss with prejudice. Plaintiff further stated that he had a Constitutional right to a fair hearing by an impartial tribunal and that he was not getting it, and would not get it, and that he wished the Judge to remove

J.A. 25(a)

himself from the case.

20. That the Court then stated substantially, "Have you finished?" and the Plaintiff replied, "Yes," and then the Court said, Well let's go on with the case. The Plaintiff stated that he could see no point in arguing the case since he believed that the Court had made up its mind^{and} that argument would be meaningless, but the Court stated that the Court wished to hear argument and therefore Plaintiff respectfully argued the case. At the conclusion of the arguments the Court granted the Motion to Dismiss with Prejudice.

21. That the Plaintiff has since filed a Motion for Reconsideration.

22. That the attitude of the Judge from the outset of this case was hostile to the Plaintiff, that the Plaintiff sensed the hostility and was surprised at it, and that Plaintiff, once he had recovered from the surprise, immediately moved to disqualify the Judge.

23. That the hostility which was displayed by the Court was of such a nature that it would prevent him from presiding over the case in a fair manner, and that the comments and rules of the Court during the hearing on the case were relevant to the question of the existence of prejudice on his part, as further shown by the fact that without hearing the merits of the case the Court disposed of the merits of the case in a prejudicial way after being informed that if he dismissed the case with prejudice, the case might be lost completely because

of the rules of New York, whereas if he transferred it to New York, the case might proceed in an orderly way for the disposition on the merits.

24. That the Court by the attitude which the Plaintiff believes it displayed toward the case showed a bend of mind that impeded the Court's impartiality; that the opening remarks of the Court show that the Court formulated an opinion on the merits of the case based upon the fact that it was filed in 1955 which opinion was not based upon the merits of the case, nor upon previous rulings by other Judges, nor upon what the Court learned in his participation in this particular case.

25. That the Plaintiff could not comply with a ten-day ruling of 28 USC 144 because he was not appraised of the Court's attitude until the day of the hearing.

26. That the Plaintiff believes that his Constitutional rights to a fair hearing by an impartial tribunal have been violated, and that the case should be sent back to Judge Waddy for disposition in accordance with his earlier statements as shown in the transcript of hearings of March 18, 1970.

The foregoing statements are made to the best knowledge and belief of the undersigned affiant.

Subscribed and sworn to before
me on this ____ day of _____,
1970.

NOTARY PUBLIC

Arthur S. Curtis
816 National Press Building
Washington, DC 20004
NA 8 - 5696
Attorney for Plaintiff

My commission expires: _____.

S. A. 25(k)

AFFIDAVIT OF GOOD FAITH

Undersigned counsel states under oath that the above affidavit of bias is made in good faith and not for purposes of delay and that it is based upon his best knowledge and belief.

Arthur S. Curtis
816 National Press Building
Washington, DC 20004
NA 8 - 5696
Counsel for Plaintiff

Subscribed and sworn to before me on this _____ day of _____ ,
1970.

NOTARY PUBLIC

My commission expires: _____.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
WITH PREJUDICE PURSUANT TO FEDERAL RULE 41(b)

Upon consideration of Defendant's Motion to Dismiss pursuant to the Court Order filed in this action on October 20, 1969, and the Memorandum of Points and Authorities in support thereof; of Plaintiff's Opposition to said Motion and the Accompanying Points and Authorities in Support thereof; of the Defendant's Motion to Dismiss with Prejudice Pursuant to Federal Rule 41(b) and/or the Inherent Power of this Court; the Accompanying Memorandum of Points and Authorities in Support thereof; and Plaintiff's objections to Defendant's said Motion and the Accompanying Memorandum of Points and Authorities in support thereof; and the said Motions having duly come on to be heard on the 14th day of May, 1970, and the Court having heard the arguments of counsel and being fully advised, and it appearing to the Court that Plaintiff had failed to comply with the said Court Order, and had failed to prosecute the action with due diligence, it is this day of May, 1970

ORDERED that this action be and it is hereby dismissed with prejudice pursuant to Federal Rule 41(b) with costs to Defendant.

JUDGE

ORDER DENYING PLAINTIFF'S MOTION FOR A CHANGE OF VENUE

Upon consideration of Plaintiff's Motion for a Change of Venue to the United States District Court for the Southern District of New York (New York City) and the Accompanying Points and Authorities in support thereof and of Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Change of Venue, and the said Motion having duly come on to be heard on the 14th day of May, 1970, and the Court having heard the arguments of counsel and being fully advised, and it appearing to the Court that Plaintiff's Motion should be denied in the interest of justice, it is this day of May, 1970

ORDERED that in the interest of justice the Plaintiff's Motion for a Change of Venue be and the same hereby is denied.

JUDGE

IN SENATE AND IN HOUSE OF REPRESENTATIVES

FOR THE DISTRICT OF COLUMBIA

20-A-29

ARTHUR S. CURTIS,

Plaintiff

v.

FOOTE, CONE, AND BUILDING, INC.

Defendant.

:

:

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:

:

:

:

CIVIL ACTION NO. 3529-55

ORDER DENYING PLAINTIFF'S MOTION TO
REMOVE JUDGE PRATT FROM THIS CASE,
TO SEND THE CASE TO JUDGE WADDY AND
TO SEND THE CASE TO NEW YORK

Upon consideration of Plaintiff's Motion to Remove Judge Pratt from this case because of bias, to have the case sent back to Judge Waddy, and to have the case sent to New York on a Change of Venue, and the Accompanying Memorandum of Points and Authorities in support thereof, including Plaintiff's Affidavits of Bias and of Good Faith, and the said Motion having duly come on to be heard on the 1st day of June, 1970, and the Court having heard the argument of Plaintiff and being fully advised, and it appearing to the Court that Plaintiff's Motion should be denied in the interest of justice, it is this day of June, 1970

ORDERED that Plaintiff's Motion to Remove Judge Pratt from this case, to send this case to Judge Waddy, and to send the case to New York be and the same hereby is denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS

Plaintiff

v.

FOOTE, CONE & BELDING, INC.

Defendant.

CIVIL ACTION NO. 3529-55

OFFICIAL TRANSCRIPT

DATE: May 14, 1970

PAGES: 1 - 58

KATHERINE K. BYRHOLDT

Official Reporter
6822 U.S. Court House
Washington, D.C. 20001

STerling-3-5700 Ext. 292

655-4500 426-7893

Prepared for:

Defense Counsel
(Mr. Coerper)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS

Plaintiff

v.

FOOTE, CONE & BELDING, INC.

Defendant.

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)

Washington, D. C.

Thursday, May 14, 1970.

The above-entitled cause came on for hearing before
the HONORABLE JOHN H. PRATT, UNITED STATES DISTRICT JUDGE, at
10:15 a.m.

APPEARANCES:

ARTHUR S. CURTIS, ESQ.
Pro Se.

MILO G. COERPER, ESQ.
Counsel for the Defendant.

- - -

P R O C E E D I N G S

THE DEPUTY CLERK: Arthur S. Curtis versus Foote, Cone & Belding, Inc., Civil Action No. 3529-55. Mr. Curtis pro se, and Mr. Coerper for the defendant.

MR. CURTIS: Your Honor, may I address the Court in a preliminary matter?

THE COURT: Yes.

MR. CURTIS: Last night about 11:30, I had a call from one of the newspapers here indicating that the President would have a ceremony at the White House. He is giving out about a dozen Medals of Honor.

The President permits me to come to the White House during these ceremonies because of my service. I have cleared this with the White House, and it usually takes about fifteen minutes to get through the gate and about five minutes or so to find the ceremony.

Your Honor, what I was hoping was that we might argue the first motion to send the case to New York under 1404(a); and in the event that I would be unsuccessful in that, that we could continue the balance.

Your Honor, may I stop a moment here and pass these to Your Honor.

(Whereupon, the books were passed to the Court.)

These are books which I prepare on more or less an

annual basis. This is the first set. And we have not printed the green book yet. I was hoping that I might get a story in the green book from one of these Viet Nam ceremonies. The government itself has bought 20,000 of these books.

THE COURT: Mr. Curtis, when is this ceremony?

MR. CURTIS: At 11:00 o'clock.

THE COURT: Let me say this: I am only going to hear two motions.

I have been through the file in a great deal of detail. We have extensive memoranda, in addition to my own examination.

There are just two matters I am going to hear. I am going to hear the motion for change of venue, which you filed on the 30th of December; and I am going to hear Mr. Coerper's motion to dismiss under Rule 41(b) of the Federal Rules.

Those are the two. And I am going to decide both of these, and I think my decisions on those will be dispositive.

Now, if you've got a ceremony at the White House at 11 o'clock, that means that you would like to leave about a quarter of 11:00.

MR. CURTIS: I think it should probably be twenty of 11:00 at the very latest.

THE COURT: What time would you be back?

MR. CURTIS: Any time Your Honor says.

THE COURT: Could you be back here by 11:30?

MR. CURTIS: No, Your Honor. Usually they have quite a ceremony. They have guards out there. They really put on quite a show, and the President always makes remarks. I think the ceremony usually takes about thirty minutes.

THE COURT: Let me ask you this: How much time do you need to argue your motion for change of venue?

MR. CURTIS: Your Honor, I would only argue two or three minutes and submit it to the Court.

I am hoping that Your Honor will find in my favor, and that will dispose of the whole thing.

There are about eight motions altogether.

THE COURT: Let's proceed as far as we can go.

We will hear you now on your motion for change of venue.

MR. CURTIS: Thank you, Your Honor.

Speaking to the record, Your Honor, my name is Arthur S. Curtis. I represent here the plaintiff, who is myself. I am a member of the D. C. Bar. I became a lawyer because of this case.

This is a motion for a change of venue to New York for this case.

This case was originally filed here in 1955 by Carl Shipley who was then my attorney.

It was filed here because Judge Holtzoff was here. He had written an opinion in Gulf v. Hamilton National Bank

which said there was viability in the incorporation of an idea. And based upon this, we filed a suit here.

At the time I have handed Your Honor a copy of the D. C. telephone book, showing at the time Foote, Cone & Belding was a party listed in the telephone book, having an office at 711 Fourteenth Street.

We, therefore, looked up the office. We filed the complaint.

Eventually the question was whether we did get service at the office. This was a little doubtful.

So we discovered that Mr. William McAdams was the agent, and we served him personally at 4545 Connecticut Avenue, Northwest.

THE COURT: Let me interrupt you right there.

The return of the Marshal indicates that Mr. McAdams was not served, but his wife was served by authorization of the plaintiff. Is that correct?

MR. CURTIS: Your Honor, --

THE COURT: Yes or no?

MR. CURTIS: I don't think it is correct, Your Honor.

THE COURT: That is on the return of the Marshal.

MR. CURTIS: Your Honor, I've read that Marshal's return, and that Marshal's return --

THE COURT: It's never been controverted.

MR. CURTIS: I beg your pardon?

THE COURT: It's never been controverted.

MR. CURTIS: Well, Your Honor, I have read it since I filed Mr. McAdams' affidavit.

Now, the Marshal's signature on that is such that you cannot even read his name. I cannot read his name.

THE COURT: "Smith," I think.

MR. CURTIS: Well, he said he served Mrs. McAdams.

Now, Mr. McAdams, in his affidavit, said he was served personally, he was served in his own home.

If Your Honor will take a look at the telephone book, you will --

THE COURT: It shows 4545 Connecticut Avenue.

MR. CURTIS: Yes, Your Honor.

So he was served at his own home.

THE COURT: He may have been served in his own home. According to the Marshal, he served the wife of Mr. McAdams by direction of the plaintiff.

MR. CURTIS: Your Honor, I believe that service on any party, on any adult, would constitute good service here.

However, this is not -- you have here the admission of the man under oath that he, personally, was served.

Now, I would think that Mr. McAdams, being a man who made \$5,000 a month, --

THE COURT: Four thousand.

MR. CURTIS: Four or five thousand a month, would

know whether or not he was served at the time.

And he says in his affidavit that he was personally served.

THE COURT: I would ask you why you didn't produce Mr. McAdams' affidavit long prior to now?

MR. CURTIS: Yes, Your Honor. May I speak to that?

THE COURT: Yes.

MR. CURTIS: Mr. McAdams was formerly Senator Taft's administrative assistant, and he was his campaign manager when Senator Taft was running for the Presidency. I was never able to get anything out of him --

THE COURT: That was in 1952, wasn't it?

MR. CURTIS: Yes. As a result of that contact, he got this account with Foote, Cone & Belding, because he had quite an influence on the Hill.

Now, I was never able to get Mr. McAdams to say anything. And I realized when I talked to him that it would be just a waste of the Court's time to set him up at that stage of his life, when he had just been getting a thousand dollars a week from these people, and try to get him to admit anything.

Mr. McAdams is a lawyer himself. And I could not get him to admit anything. And it wasn't until recently, after we went through this procedure, after Judge Jones told us to go forward, that I finally ran into him and approached him again on this subject.

And I asked him, "Are you still with Foote, Cone & Belding?"

He said, "No, I haven't been with them for several years."

I said, "Well, now, how about telling me."

And the affidavit is what he told me.

So, Your Honor, presumably he is now in a position where he doesn't think that Foote, Cone & Belding is going to give him anything any more, and he's in a position where he can make a truthful affidavit without hurting his economic interests.

And I think that's what we have here.

Mr. McAdams is a very respectable member of the community. He is a member of the Press Club, and highly regarded on the Hill.

So this is why I didn't -- I don't like to waste the time of the Court by having a man who is very knowledgeable sit up there in a battle of wits to see if I can get him to admit that he was actually on the pay roll.

You will notice in his affidavit he is very cagey about that. He doesn't say what he got.

And we do know from their affidavit, their counter-affidavit, that he was on their pay roll.

But I couldn't even get him to say at the time that he was on the pay roll.

So it would have been a waste of Your Honor's time to

bring him here and try to cross-examine a man like that. He's a much cleverer man than I am, Your Honor. I've never made a thousand dollars a week. And I worked at the Senate at one time, but I was never administrative assistant to a man as great as Senator Taft. I know I am no match for a man like Mr. McAdams. Unless he wanted to make a truthful statement, there was nothing I could do.

So this is why I did not bring him here, Your Honor.

Your Honor, at the time that the suit was filed, which was 1955, we did what we thought was right, that the law required.

These people held themselves out as being in Washington. They were on the bulletin board. Their name was on the board.

We filed the suit here.

We could also have filed it in New York.

Now, that's one of the requirements of 1404(a).

But we didn't do it because Judge Holtzoff was here, Your Honor. And we felt sure he would hear this case. He was hearing all these cases.

Now, for the next fourteen years I chased them and I chased them and I chased them.

At the time I was studying under Judge Laws at Georgetown, I used to chase these people to every advertising council meeting. I had a Marshal there. At one time I came

there, and there was Judge Laws. He said, "Curtis, what are you doing here with a Marshal?"

I said, "I'm looking for Fairfax Cone."

He was the President of this thing.

Well, Fairfax Cone knew I was there, and he didn't show up.

Judge Laws got quite a kick out of that.

So if anybody wonders whether I have been diligent, they simply have to look at that record.

I made service after service. I made investigation after investigation. And I couldn't catch these people. They closed their office and left town.

Now, I did that for fourteen years, until Judge Jones -- periodically, I believe -- I had three accidents -- they almost won this case just by sitting on their haunches. I had three accidents. One car was rear-ended by a drunk, and the car was a total loss. I was rear-ended again. And I fell down an elevator shaft.

Now, if any of those things had been fatal to me, they would have won the case, simply because they stayed out of the jurisdiction.

When Judge Jones gave me my final chance to proceed with this case last year, I contacted a New York attorney; and through him I learned who their clients were, and thereupon I attached before judgment Sears, Roebuck and Company, and I

could have attached a lot of others here. They had much more outstanding than \$10,000/here, but it cost me a hundred dollars just to attach the \$5,000.

So we attached, and as a result of that, we came in and answered.

Now, they have known about this suit for a long, long time. The record I have provided Your Honor shows that.

I contacted them before I filed the suit.

They actually, if Your Honor permits me to use the word, they stole a strip out of the funny papers.

THE COURT: That is not pertinent here.

MR. CURTIS: Yes, Your Honor.

THE COURT: That is a different matter.

MR. CURTIS: Yes, Your Honor.

THE COURT: That will have to wait. We can't pass on that one way or the other.

MR. CURTIS: Yes, Your Honor.

Now, Your Honor, we have filed a suit in New York, an original suit, comparable to this, and we have gotten good service on the attachment before judgment, so Your Honor does have jurisdiction.

THE COURT: Say that again.

MR. CURTIS: I say that Your Honor does have jurisdiction of this case, because there is an attachment before judgment.

THE COURT: What connection does an attachment before judgment have as to our jurisdiction?

It certainly doesn't give us personal jurisdiction over the defendant if he hasn't, in fact, been served.

MR. CURTIS: Well, he's come in and answered with a motion to dismiss.

When he came in and answered with the motion to dismiss on the ground of laches, he submitted himself to the jurisdiction of this Court.

Mary Stuart made the same mistake, Your Honor.

THE COURT: When was that?

MR. CURTIS: Well, when she lost her head. You recall in that famous trial of Mary Stuart --

THE COURT: 1584 in Fotheringay Castle.

Keep on going.

MR. CURTIS: But I'm not saying that I'm in sympathy with what happened to Mary Stuart at all. As a matter of fact, I'm not in sympathy with it.

But this gentleman came in and said, "You can't try me for cause, so therefore dismiss."

Now, when he did that, he submitted to the jurisdiction of this Court.

Now, as far as the other matter, Your Honor, as to whether Your Honor --

THE COURT: You mean we've got personal jurisdiction

merely because your opponent filed a motion to dismiss, is that it?

MR. CURTIS: No, Your Honor. We have personal jurisdiction because Bill McAdams came in and gave an affidavit and said, "I was served, I got in touch with Fairfax Cone, and he said send the thing to me."

And then apparently as a result of some conversation between them, they decided that they didn't need to come in at that time.

Your Honor has been supplied with letters to show that they have known about this case since 1954.

THE COURT: Sure they have known about it since 1954, but is that the equivalent of being personally served in this jurisdiction?

MR. CURTIS: Well, Mr. McAdams was certainly personally served in this jurisdiction.

That would be an issue of fact for a jury, it would seem to me, Your Honor.

Now, Your Honor, we have served them in New York. There's a suit going in New York.

I'm a resident of the State of Virginia. They are residents of the State of New York.

We have diversity of citizenship. The amount is over \$10,000.

We do think for the convenience of parties and wit-

nesses and in the interests of justice and to cut down the costs of this thing that the whole case should be sent to New York; as, in fact, Your Honor, Judge Hart said I should do, Judge Jones said I should do.

They both said why don't you file it in New York.

So I filed it in New York.

Now, I've done everything that the Court told me to do.

I do think that the interests of justice, Your Honor, dictate that the case should be sent up there so both cases can be tried together.

THE COURT: Aren't the cases duplicates of one another?

MR. CURTIS: Yes, duplicates of one another.

THE COURT: The only reason you want to shift this to New York is because the issue of the Statute of Limitations is arising in that court?

MR. CURTIS: I wouldn't say that, Your Honor.

THE COURT: Why don't you pursue your case in New York and abide by the results of that case?

MR. CURTIS: It would help -- Section 205 of the New York Civil Practices Act spells out -- and I have that here -- would Your Honor like to have me leave it with you?

THE COURT: No, we have it. Keep on going.

MR. CURTIS: Section 205 of the Civil Practices Act

points out that if a case is dismissed by this Court, then it would prejudice my case up there.

Otherwise, I have six months from the time that the case would otherwise -- if it were terminated in some other way, I would have six months in New York -- that was changed in 1965 from one year to six months -- to pursue my action.

Now, I know Your Honor in a case like this would like to see a disposition on the merits.

THE COURT: I don't care.

Frankly, I think this case is just a travesty on the Court. I think that this Court has been taken advantage of. I think that this would never have happened with the individual calendar.

We have gotten down now where this happens to be my problem, and this is where it is going to end. I can't shift it to anybody else.

We have had something like seven or eight Judges of this Court who have taken a bite at this thing, and sometimes more than one bite. Not a single one has gotten an overall view of this case in its entirety. And, Mr. Curtis, the buck is going to stop here. We are going to dispose of it one way or the other today.

MR. CURTIS: Well, Your Honor, I think the proper disposition of the case is to send it to New York because, in the interest of the convenience of the parties, the witnesses

are up there, and so forth.

Thank you, Your Honor.

THE COURT: Mr. Coerper.

MR. COERPER: Your Honor, my name is Milo G. Coerper. I am attorney for Foote, Cone & Belding, Inc., the defendant in this case.

I would like to address myself, Your Honor, to the two basic questions, namely, the jurisdiction of this Court; and, secondly, if the Court feels it has jurisdiction, the question, in the interests of justice, under the forum non conveniens doctrine.

It is our position that Mr. Curtis never has served the defendant, and that the Court does not have personal jurisdiction in the case.

The question of the attachments, each one was for the amount of \$2500, this is below the \$10,000 diversity requirement, and we feel that --

THE COURT: Let me stop you there, Mr. Coerper.

Don't you think that the matter of jurisdiction is controlled by the allegations of the complaint and not by the amount that a person is able to pick up by way of attachment before judgment?

MR. COERPER: Oh, I definitely do, Your Honor. Yes. But I --

THE COURT: There is one question I would like to

address to you:

Did you submit to the general jurisdiction of this Court when you filed your motion to dismiss?

MR. COERPER: We definitely did not.

THE COURT: Or when you filed your response to Mr. Curtis' motion for change of venue?

MR. COERPER: No, we did not, Your Honor. We did not submit to the general jurisdiction of the Court.

In fact, we avoided this all these years. All of these matters that came up from 1955 to 1970 were all ex parte.

Foote, Cone & Belding stayed out of the case completely. We only came in after he went to New York and served the company in New York.

We weren't sure at the point what the law would be, and we felt we had to protect ourselves at that point and come into this case, solely for the purpose of telling the Court it didn't have jurisdiction.

On the question of the forum non conveniens doctrine, in the interests of justice, we think the lack of diligence in this case is blatant.

The case was filed in August -- August 5, 1955.

It was dismissed and reinstated four times over the years.

Mr. Curtis at any time could have brought this

action in the State of New York. He apparently decided not to do so.

When Judge Jones came out with his order in October and told him he would have to serve by December, he then did go up and start a case in New York. And then he filed a motion for change of venue in order to bring this case to New York, so that we would not have the defense of the Statute of Limitations in the New York action.

And it seems to me that is his only purpose here, and this is not in the interests of justice.

There are a number of cases that say that a plaintiff doesn't even have the right to ask for a change of venue; but that if he does, he certainly has the burden of proof, to prove that it is in the interests of justice.

And it is our position that it is definitely not in the interests of justice, and it would deny procedural due process to the defendant if it were granted.

I'm willing to answer any other factual or other questions that the Court may have in the matter.

It is obvious that the Court is fully familiar with the record.

THE COURT: One thing I would like to pursue a little further:

I think you indicated that everything up until the time of Judge Jones' order was ex parte, is that correct?

MR. COERPER: That's right.

THE COURT: And Judge Jones indicated that service would have to be made by the 31st of December, 1969, or the case would be dismissed without prejudice?

MR. COERPER: That's right.

THE COURT: And you came in on the 22nd of January and moved to dismiss on the ground that service had not been perfected by the 31st of December, 1969.

And then at the same time, or a little later, you filed a motion to dismiss with prejudice, pursuant to Rule 41(b) or the inherent power of the Court?

MR. COERPER: That's right, Your Honor.

I raised it based on a very recent Court of Appeals decision which was just decided in June of 1969. It was an appeal from an order of Judge Hart dismissing for lack of diligence a case, on the facts very similar to this one. In fact, the facts weren't quite as gross as the facts in this one.

And Judge Tamm upheld that dismissal and cited the language that I have cited in our case, namely, that you can dismiss a case based on Rule 41(b) or that it is within the inherent power of the Court to dismiss.

And based on that decision and the fact that Mr. Curtis persisted to file other motions which we had to constantly answer, we felt that we had better proceed then,

and asked for a dismissal with prejudice.

THE COURT: And it is your position that this really doesn't fit within 1404 to justify a change of venue?

MR. COERPER: That's right, Your Honor.

We believe that the requirement of the language of 1404, namely, in the interest of justice, is not satisfied in this case; and, in fact, it would not be in the interest of justice to transfer this case because it would eliminate for the defendant one of the strongest defenses, namely, the Statute of Limitations.

THE COURT: You are not claiming, though, that the failure to make personal service on the defendant in this jurisdiction deprives us of the power to order a change of venue?

MR. COERPER: No, we have researched that, Your Honor, and we feel from our research that even if you don't have personal jurisdiction, if you have subject matter jurisdiction, you may change venue.

But we have even questioned whether the Court has subject matter jurisdiction.

We don't know if it's appropriate that the Court should look into the matter of subject jurisdiction. We feel that you don't have personal jurisdiction. We don't know whether you should look into the matter of subject jurisdiction.

If you do look into the matter of subject jurisdiction,

then we feel that even that isn't satisfied, because it would have to be at least the subject matter of \$10,000, and the two attachments total only \$5,000.

THE COURT: And the case that you referred to of Judge Hart that Judge Tamm affirmed was the Sheaffer case, 408 F. 2d 204?

MR. COERPER: Yes, Your Honor. Sheaffer v. Warehouse Employees Union, Local #730.

I have a zeroxed copy of the case here if Your Honor wants to take a look at it.

THE COURT: We have that.

MR. COERPER: Well, Your Honor, --

THE COURT: As you can gather from my comments, I am going to deny the motion for a change of venue.

And I will request counsel for the defendant to present an order with the appropriate recitals.

MR. COERPER: Thank you, Your Honor.

MR. CURTIS: Your Honor, --

THE COURT: Yes, Mr. Curtis?

MR. CURTIS: May I speak a moment to that?

THE COURT: Yes.

MR. CURTIS: I have in my hand a response to requests for admissions.

This is, in fact, an answer that they filed to a pleading in the case. They filed an answer. Therefore,

Your Honor has jurisdiction.

THE COURT: Even assuming that we have jurisdiction, whether it is subject matter or on the basis of the defendant through his agent having been served, which of course they deny, I won't order a change of venue in this case.

And I have asked counsel to prepare the appropriate order.

THE COURT: Now, I think you indicated before that you have to get moving now.

MR. CURTIS: Yes, Your Honor. I have to be at the White House.

Your Honor, suppose we submit the other matter to you on the pleadings, and presumably --

THE COURT: No, I want to hear argument.

We will set this for 12:00 o'clock.

MR. CURTIS: Can you make it at 1:30, Your Honor, or right after lunch?

THE COURT: All right. We will set it at 1:45.

MR. CURTIS: All right.

MR. COERPER: This is on the motion to dismiss?

THE COURT: This is the motion to dismiss, both the motion to dismiss in connection with Judge Jones' order and the motion to dismiss in connection with Rule 41(b).

MR. COERPER: Thank you, Your Honor.

MR. CURTIS: Your Honor, --

THE COURT: Yes?

MR. CURTIS: Your Honor, I must say -- may I speak frankly to the Court?

THE COURT: Well, I don't know what you're going to say.

MR. CURTIS: May I have permission to speak frankly to the Court?

The Court indicated before it ruled that it was going to hear both motions, and that it was going to dispose of the matter today.

That was before it heard the first motion.

THE COURT: If I had ordered the change of venue, there would be no point in hearing the motion to dismiss.

MR. CURTIS: Yes, Your Honor, but if I may speak frankly, I had the impression at the time that Your Honor had made up your mind at that time, before I argued.

Could I speak frankly to the Court? And that's why --

THE COURT: Well, you can't read this file, Mr. Curtis, without coming up with certain tentative conclusions.

And a great deal of time has been spent on this file.

I am perfectly frank to admit that we did reach some tentative conclusions, but obviously they couldn't be final. You are entitled to argue. And that's why we set the two key motions down.

Now, if I granted your motion for a change of venue,

there wouldn't be any point in discussing the motion to dismiss, the matter would have been out of the way. But I denied your motion for change of venue, and --

MR. CURTIS: Well, Your Honor, -- excuse me.

THE COURT: -- and I intend to hear the defendant's motion to dismiss.

MR. CURTIS: Well, Your Honor, I would like to exercise my prerogative as a Harvard man, speaking to a Harvard man, --

THE COURT: You can leave Harvard out of this. It doesn't have anything to do with this case.

MR. CURTIS: I do believe Your Honor is going to find in his favor, because I had that impression when Your Honor spoke previously.

And that is why I would be willing to submit it, but I am at Your Honor's disposal.

THE COURT: No, we will hear argument at 1:45.

(Whereupon, at 10:45 a.m., the Court recessed.)

AFTERNOON SESSION

1:47 p.m.

MR. CURTIS: I had something preliminarily, Your Honor.

THE COURT: Yes, Mr. Curtis?

MR. CURTIS: Did Your Honor have a copy of this transcript in the file?

THE COURT: I don't think so. What is the date of it, Mr. Curtis?

MR. CURTIS: Well, Your Honor, this is the transcript of the proceedings in front of Judge Waddy, March 18, 1970.

On page 4 -- this was the hearing before you had it -- Judge Waddy said:

It appears to me that inasmuch as there is a pending case in New York which I understand to be on all fours, and where there is no question about service, that this case ought to be transferred; and if the New York Court sees fit to dismiss in the light of their Statute of Limitations, then many of these things would be disposed of.

Now, that is what Judge Waddy said in his hearing.

Then, Your Honor, he also said on page 5:

Well, I don't think it would be proper for this Court to dismiss with prejudice where other Judges of this Court have from time to time reinstated this case. I certainly would be saying that the other Judges were wrong in reinstating the case on other occasions when they reinstated

the case, and I do not think it would be proper for me to do such..

Now, Your Honor, since Your Honor did not have this -- I paid for it, I paid \$19.50, and I was assured by the Reporter that this would be in the record.

Since Your Honor did not have it, I will --

THE COURT: Well, Mr. Curtis, Judge Waddy heard this case. And when he found that it was assigned to us, he called me up and told me about this rather ancient case with numerous motions pending.

And I said, "Well, that's fine, Judge, why don't you decide it yourself? You keep it."

He said no, this is your case. He said, "I've started to work on it, but I'll send it over to you."

I said, "All right. When it gets here, this is where it will stop." I said, "That is why we have an individual calendar."

Now, Judge Waddy, whatever his opinions were, didn't make a decision on sending this up. I'm glad to know what his views are with respect to the matter of a change of venue, but he did not make the ruling, and I think that is our responsibility.

MR. CURTIS: Your Honor, he also said:

I will retain jurisdiction of this case, and the Motions Clerk will set it down for the first available

date after the 1st of April. Although I will not be sitting in the Motions Court, I will retain jurisdiction of it.

May I pass this up to Your Honor?

THE COURT: Well, he didn't retain jurisdiction of the case because we divided the backlog of cases among the fourteen or fifteen Judges; and among the three hundred that I got, Mr. Curtis, this is one of them. This happens to be the oldest case in the court house.

MR. CURTIS: Your Honor, that's not my fault. It's their fault. They knew this case was here. All they had to do was to come in and answer.

THE COURT: They don't have to answer until they are personally served.

MR. CURTIS: Well, then they ran. They ran for fourteen years, Your Honor.

THE COURT: They have got a right to run, if they want to.

MR. CURTIS: It shouldn't be to my prejudice. If they run, it shouldn't be to the prejudice of the person who has the case. And on the face of the case, everything that I say in that complaint has got to be taken as true until it's proved otherwise.

That's true on the motion to dismiss and on any other considerations that are dispositive of this case.

Your Honor, also there was one other thing:

Section 205 of the Civil Practices Act of New York points out that if a case is terminated by a voluntary discontinuance -- in other words, if I took a voluntary dismissal or if the case is dismissed for negligence to prosecute the action, then my case is dead in New York, and you have killed this case.

Now, Your Honor, since Your Honor didn't have the benefit of that record and the views of Judge Waddy, I rather think that Your Honor might not, if Your Honor had seen that, Your Honor might not have said that anybody who saw this case would think it was a travesty on this Court to file this --

THE COURT: I still think it's a travesty on this Court. I think all you've got to do is to read the docket entries, read the file accompanying them.

About eight Judges had a piece of this, and some of them had more than one piece. Some of them had several bites. This case has kicked around for fifteen years, Mr. Curtis.

MR. CURTIS: How does it affect the justice of the case?

THE COURT: Well, in the first place, it has taken up the time of all kinds of courtroom personnel, of Marshals. There were twenty-five attempts to serve process.

MR. CURTIS: That's right. That's what the courts are for, Your Honor.

THE COURT: It has taken up the time of numerous members of this Court when you could have in 1955 gone to New York and gotten service perfectly well.

MR. CURTIS: Well, that doesn't make any difference. As the plaintiff, I had that choice.

THE COURT: You had that choice, but you elected to come down here and get personal service.

MR. CURTIS: I have a constitutional right to do that. Now, Mr. McAdams said --

THE COURT: You don't have a constitutional right to continue this case in this Court forever.

MR. CURTIS: Your Honor, Mr. McAdams says that he was personally served.

THE COURT: I don't believe Mr. McAdams' affidavit would have any effect, particularly in view of the Marshal's return, and particularly in view of the return that Mr. Coerper made on behalf of Mr. Balian.

MR. CURTIS: Well, Mr. Balian said to me personally that he wasn't even working there but six months. Now, how does he know about Mr. McAdams back in 1955?

THE COURT: And furthermore, if Mr. McAdams was personally served in 1955, as you say that he was, why did you wait until 1970, fifteen years later, to try to demonstrate it?

MR. CURTIS: Your Honor, I pointed that out, because he was unwilling to talk. And if he was unwilling to talk to

me, there wouldn't be any point in putting him on the stand and putting him under oath expecting that I could get anything out of him.

It was only after the economic relationship was severed and the thousand dollars a week was gone forever that I had any chance at all of getting any justice in this matter.

Your Honor, as a citizen of the United States, and even if I weren't a citizen of the United States, I am entitled to my cup of justice. I am entitled to an impartial tribunal. I am entitled to a hearing.

Really, Your Honor, with all due respect to the Court, I do think, Your Honor, that the record clearly shows that simply by a change of Judges, I have been deprived of this.

I respectfully move, as is my right under 28 U.S.C., I respectfully move that Your Honor disqualify himself from this case; that Your Honor recall your previous ruling, because the record was not complete, as Your Honor has just admitted. The record was not complete when you reviewed it. And send this case to another Judge.

THE COURT: Is there anything more you have to say, Mr. Curtis?

MR. CURTIS: Well, that is what I have to say, Your Honor.

I must say that any other case that I have, I will be

delighted to have you hear it.

But when I came into the court house this morning, I heard words here at the bench, among the employees, that the Court was very much concerned about a case being in court that was dated as old as 1955.

THE COURT: That's right.

MR. CURTIS: Your Honor, I would like to retain possession of the copy of the transcript that I gave you, and ask that the copy that Mrs. Blair was paid for and should have filed be placed in the jacket of this case, because presumably this case will now become something for the U. S. Court of Appeals.

But I specifically make this motion under 28 U.S.C., Your Honor. And I do think, in the interest of justice, since the facts were not fully available to Your Honor, and in view of Your Honor's attitude, that Your Honor simply remove himself from the case and recall your previous order and let it be heard by another Judge.

THE COURT: I said when we started to hear this case, Mr. Curtis, that the buck was going to stop here. And I told you earlier that we were going to decide this matter one way or the other.

I take it that you have concluded.

Mr. Coerper, we will hear from you.

MR. CURTIS: Your Honor, this is his motion, and

those were my preliminary remarks.

THE COURT: All right.

MR. COERPER: Thank you, Your Honor.

I would like to take just one moment to respond to Mr. Curtis's preliminary remarks regarding the comments of Judge Waddy.

The Judge, of course, did state what he said, but the Court realizes that the case was before him suddenly, he had not had the opportunity to review the file at all, and it was for that very reason that he gave us the opportunity to argue these motions and, in fact, to prepare them.

And that's what we are here to do today, to argue the motions, based on a record which was not available to Judge Waddy at the time that Mr. Curtis very peremptorily asked him to rule on the matter.

I would now like to address myself to the two motions to dismiss, one to dismiss based on Judge Jones' earlier order and the subsequent motion to dismiss with prejudice based on Rule 41(b) and the inherent power of this Court.

As regards the motion to dismiss based on Judge Jones' order, this motion was filed very shortly after Mr. Curtis began his action in New York. We felt that we had to act promptly. We were worried that the case in New York, plus the request to change venue, might be acted upon in this Court without the opportunity to review the record and without the

full record going to New York, so we felt we had to enter into the case.

Naturally we wanted to preserve the question of jurisdiction.

We discussed the case with the Motions Commissioner. And we were informed at that time that there was this outstanding order of Judge Jones.

And we reviewed that order, and we felt that it would be appropriate at that time to file a motion to dismiss based on that order, because that order required that Mr. Curtis get jurisdiction by December 31, 1969, by proper service on the defendant.

It is quite obvious from the record that Judge Jones anticipated and thought that the service would be personal service on the defendant.

It was an in personam action throughout, up to this time, sixteen years.

After Judge Jones' order was issued, Mr. Curtis proceeded to New York, had service made on the company there, had attachments on two of the defendant's creditors here in Washington -- incidentally, these were the branch offices of the creditors, they weren't the main offices of the creditors. And based on that, that changed the nature of the action from in personam to in rem.

This, of course, was not what Judge Jones had in

mind, and raised the question whether or not Judge Jones' order had been carried out.

We believed that it had not been carried out, and the case should then probably have been automatically dismissed based on that order.

However, we had the opportunity then to further review the file ourselves.

I might add, and it's no one's fault, that this file was unavailable to counsel. It was in about two or three different pieces in the court because it had been existing since 1955. And finally we managed to get the whole file put together so we could review it. And I have a feeling that many of the prior Judges did not have the full file before them at the various points when they issued the reinstatements in this case.

On the review of the entire file and further legal research, we felt it was much more appropriate to seek a dismissal of this action with prejudice based on Rule 41(b) of the Federal Rules of Civil Procedure. We also based it on Rule 13 of the local rules and on the inherent power of this Court.

And we filed a motion to this effect, with a statement of points and authorities, reviewing the facts of the case, pointing out that the case had already been reinstated four times in ex parte proceedings, with only part of the record before the Court in each instance.

And we then felt it was appropriate to ask for dismissal, one, under Local Rule 13, which states:

"A case shall not be reinstated more than once."

THE COURT: That was a recent amendment of the rule, wasn't it?

MR. COERPER: That's right, Your Honor.

THE COURT: It went into effect in October 1969?

MR. COERPER: October 1969, right.

THE COURT: There is some question whether that has ex post facto effect.

MR. COERPER: I agree, Your Honor. Although it certainly is a rule that the Court should take into consideration.

Then the second point was that under Rule 41(b).

Rule 41(b) provides:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action."

We cited the use of this rule by various courts. We cited Delta Theatres, Inc. v. Paramount Pictures, Inc., 398 F. 2d 323, 5th Circuit, 1968. I would like to quote from that case the language most relevant to this case:

No action had been taken by plaintiff in this cause since December 23, 1959, and since transactions were involved in this case dating from 1947, the defendants have

been prejudiced by plaintiff's lack of diligence. It would be an intolerable situation which would not permit a dismissal with prejudice under circumstances such as those present in this case. Approximately fourteen years after suit was filed, with no action taken for about seven years, plaintiff cannot be heard to complain that his case has now been dismissed with prejudice. It is surprising that such action was not taken by the district court sua sponte long before defendants filed their motion. No plaintiff should be permitted to sleep on his rights and harass a defendant with such unreasonable delay.

Clearly in this case the defendant has been prejudiced by plaintiff's lack of diligence. Defendant cannot be expected to round up witnesses after some sixteen years have passed or documents of the same vintage. Nor should defendant be continuously subjected to plaintiff's harassment and the resulting time, energy and expense involved in defending himself from same.

We also then cited the most recent case in our own Court of Appeals, Sheaffer v. Warehouse Employees Union, No. 730, for the proposition that this Court may dismiss a case with prejudice based on Rule 41(b) or based on its own inherent power.

It's quite obvious, Your Honor, that the plaintiff

in this case has clearly shown a lack of diligence in prosecuting this case, and it would be putting the defendant to a great expenditure of time and energy to try to round up witnesses, to put together materials based on a case that is now sixteen to eighteen years old.

And based on the authorities of this circuit, we would request that the Court dismiss this case based on lack of diligence, dismiss this case with prejudice.

Thank you, Your Honor.

THE COURT: Mr. Curtis.

MR. CURTIS: Your Honor, in arguing, of course, I do this on condition that I preserve the rights that I have by the previous statements which I made.

THE COURT: To what do you have reference, Mr. Curtis?

MR. CURTIS: I have reference to the fact, Your Honor, that I do not think that Your Honor should have heard this case if Your Honor had an attitude which, as I respectfully say with all due respect to Your Honor, -- and I have great respect for Your Honor -- to say that you were only going to hear two motions, when there were eight motions pending, several of them filed prior to his motion, such as, for example, a motion by default filed prior to his, a motion to transfer, filed prior to his.

Now, the first one would be a motion for change of venue. So that if Your Honor said you were only going to hear

two motions, Your Honor, it would appear to me, would be saying at that point that you were going to deny the first motion and grant the second motion, in this way never come to the other six, including those filed prior to his.

Now, I respectfully say, Your Honor, that I'm sure that if Your Honor had thought about it, Your Honor would have removed himself from this case, because every man is entitled to a fair hearing, and I don't feel that it is right -- I don't think I have had it in this matter, particularly in view of the fact that you did not have the official transcript in front of you.

THE COURT: You mean of this matter before Judge Waddy?

MR. CURTIS: Yes.

THE COURT: Is that what you mean?

MR. CURTIS: Yes. Yes, I think if Your Honor had known that Judge Waddy had said that he thought the case should go to New York, and that he didn't want to prejudice my rights there by anything here, and he planned to send it to New York, I believe Your Honor would have found otherwise, because it meant that another Judge had thought about this and had come to a conclusion.

I paid \$19.50 to the Reporter so that Judge Waddy would have it available to him, and so that any other Judge would have it available to him.

THE COURT: Would you like me to take time out and

read that now?

MR. CURTIS: Yes. I mean, I would like you to take time out and read it now, I've read it to Your Honor. I think Your Honor has put yourself in a rather difficult position.

THE COURT: No, I am not in a difficult position. You are the fellow who is in a difficult position. And don't you forget it, either.

MR. CURTIS: I'll agree to that, Your Honor. It's my case, and I have worked on it, a whole life has gone into this, a whole life has gone into this. And everybody who knows about this is very angry about it.

And the question is: Will the courts grant any relief to an author who was seized upon by a major advertising agency --

THE COURT: Just hold up here just a second.

(Whereupon, the Court perused the transcript.)

THE COURT: I have read this, Mr. Curtis.

MR. CURTIS: Your Honor, I see that there are people in the courtroom.

And I want to say that I have great respect for Your Honor, through Colonel Hudson and others before I ever met you, I had the highest regard for you.

THE COURT: Well, you can leave that out. Let's get down to the --

MR. CURTIS: But I do think --

THE COURT: Let's get down to the matter of the merits of your position.

Now, the defendant has made a motion to dismiss, not only pursuant to Judge Jones' order of October 20, 1969, but also under Rule 41(b).

Now, the reason why you're on your feet, Mr. Curtis, is to respond to that motion.

MR. CURTIS: Yes, Your Honor.

Well, Your Honor just read the transcript, --

THE COURT: Yes.

MR. CURTIS: -- and I was hoping that, based on that, Your Honor would reverse your ruling of this morning for the reasons that Judge Waddy pointed out, that you certainly don't want to prejudice a fellow's case in another court when, simply by sending it up there, the Judge up there who is going to hear the other case can hear this case.

Now, Your Honor, I have fought for fourteen years. And I think the record shows that I stay in there, I really hang on. I have fought for fourteen years to get this matter to a point where I could get it there. I only brought it there because some of the Judges of this Court told me to file it in New York, including Judge Jones when he added time. He said, "Go ahead. I'll give you so much more time, and if you can't do it, I'll dismiss it without prejudice." Not for failure to prosecute, but simply because I hadn't been able

to effect service.

Everybody who looks at that record will see that I did what I could to prosecute this case. But you can't find a fellow who provides a president for the advertising council, and the president won't even show up on the platform because I'm there with the Marshal. I'm doing everything I can under those circumstances, Your Honor.

So I would think, Your Honor, and I would like to argue this to Your Honor, that you should reconsider, first of all, the motion from this morning and send it up to New York, as Judge Waddy said very clearly he would have done, and settle this whole matter. Let New York worry about it.

New York has the advertising industry. They understand the advertising industry. They have Judges who know the habits of the advertising people. This is an old question with them. So in order to competently handle it, they can do it like that and not burden this Court with it.

Your Honor, I will go this far: If Judge Holtzoff had not been here, we would not have filed it here. He was a great legal genius in the field of literary property and that kind of thing; and when he died, that's when we filed the case up in New York.

I must say, Your Honor, that there came a time when Judge Holtzoff knew about this case, spoke with me, and he did seem -- I got the -- all I want to say is that he knew the

case was here. Judge Holtzoff knew the case was here, and he reinstated it himself. And I gathered he wanted to hear it. And I wanted to keep it here so that he could hear it; but when he died, we did take it up to New York.

I would like to really respectfully move that Your Honor reconsider his ruling of this morning in the light of the transcript that you have and based on the fact that you have had the benefit of another opinion by another Judge of this Court, that Your Honor send it up to New York, and let the court there worry about it instead of bothering our Court of Appeals about it.

Or, in the event that Your Honor lets it stay here, putting the parties to the expense of having two cases proceeding like two horses along a track, different tracks, both racing each other to a finish.

May I respectfully ask Your Honor to rule on that motion.

THE COURT: Well, I am not going to reconsider my previous ruling, in which I denied your motion for a change of venue, Mr. Curtis.

MR. CURTIS: Referring now to Mr. Coerper's motion to dismiss, he has two motions to dismiss, one is without prejudice and the other is with prejudice.

The one without prejudice is based on the fact that they've gotten no service.

We have, in fact, obtained in rem jurisdiction. We could, on a motion to dismiss, -- everything that is pleaded in the complaint must be taken as so, all the allegations that I made have got to be taken as so, and also in view of the statements of Sears, Roebuck and Company that they have substantially more money than what I attached, and so forth, it's clear -- well, let me say that it's not clear, that I could not get \$10,000 on an attachment instead of \$5,000.

The reason we attached \$5,000 instead of \$10,000 was that we wanted them to come in and answer.

We could come back, pay another \$100 to the bondsman and attach \$5,000.

So as far as the jurisdictional amount, I don't think that there should be any question in the Court's mind that we have the jurisdictional amount by our allegations. It would have to be absolutely clear that we could never reach \$10,000 before Your Honor could dismiss on grounds of jurisdiction.

THE COURT: Mr. Curtis, there is no question about the jurisdiction of the Court on the subject matter. The jurisdiction of the Court over the subject matter is normally determined by the allegations of the complaint.

Whether you can attach before judgment, the accounts of ten or a dozen people and whether those amounts aggregate

\$10,000 or more is a matter, in my judgment, that is of no consequence. What we are talking about, and I've tried to make it clear and I think you realize the problem, is the gut question of whether or not you ever got personal service on the defendant. And that is the issue.

Mr. CURTIS: Yes. Well, now, Your Honor, whether we ever got personal service on the defendant, Your Honor, first of all, the threshold, at the threshold, Your Honor, if we did not get personal service on the defendant, then we are entitled to a judgment of condemnation as to the \$5,000. That is the first question.

Now, secondly, we have the affidavit of Mr. William McAdams who said, "I was personally served."

Now, furthermore, we have corroboration by their affidavit which says yes, Mr. McAdams did work for us.

In other words, there is enough corroboration of what Mr. McAdams said to give his affidavit standing.

Now there is then an issue of fact, Your Honor, as to whether Mr. McAdams' affidavit is credible. And this is an issue of fact. Since it is an issue of fact, it cannot be determined as a matter of law, it must be determined by a jury. And Your Honor is not a jury.

So Your Honor cannot find that service was bad. This will have to be determined, Your Honor, I argue, by a jury.

Now, the second point is they have submitted to the jurisdiction of this Court by filing a lot of answers. They filed -- I have in front of me here, let me see, a response to request for admissions; request for admissions, Your Honor, is a pleading under Rule 36. Response to request for admissions constitutes a pleading; is an appearance. There was no reservation of rights when they responded to the request for admissions.

Consequently, in responding to the request for admissions they made an appearance. And since they made an appearance, they are here. And since they are here, the problem of service is not present.

That is the second point I have to make.

And the first point, then, Your Honor, was that Mr. McAdams' affidavit stands as a fact.

Secondly, according to the rules of pleading, and we must live by certain rules, they have entered an appearance by their pleadings.

There are other pleadings. Defendant's statement of points and authorities in opposition to plaintiff's motion for default judgment. I did file a motion for default judgment. They came in, Your Honor, and answered. They said don't give him the default judgment.

Now, when they came in and answered, Your Honor, they became a party to the case. They can't stand here and say you

have no personal jurisdiction of us when they became a party to the case and opposed the motion for default.

Now, they filed another one, opposition to plaintiff's motion for change of venue. Here, again, they appeared as a party. They didn't appear specially, they appeared as a party. And they said we would oppose the change of venue.

So, Your Honor, having submitted themselves to the jurisdiction of the Court, they are not in the position now to argue that they are not before the Court except for the purposes of the motion to dismiss.

They filed also objections to plaintiff's requests for admissions of fact.

They filed motions for continuances.

In other words, Your Honor, I do not see how anybody who's ever handled one case in the federal court, who has ever taken one course in federal civil procedure, could hold or find that these people were not present before the Court. They are here.

Now, with reference, then, Your Honor, to that -- does that answer that question, Your Honor?

be

THE COURT: Well, it will/an answer, but go ahead.

I take it that you have shifted your ground now, and you are not emphasizing the attempted personal service through Mr. McAdams, but you are now saying --

MR. CURTIS: In addition to the personal service.

THE COURT: -- that even though Mr. McAdams' affidavit was not a part of the file, you claim that these pleadings on the part of the defendant amounted, in effect, to a general appearance?

MR. CURTIS: Yes, Your Honor. That is the argument, really.

Now, Your Honor, with reference to -- they say they have been prejudiced. It's just the other way around. I'm the one that's been prejudiced, not they. The letters that I showed Your Honor, I placed in the file, show that as early as 1954 I was in touch with these people before we filed the suit.

I had been working for Senator Fulbright in the Senate when this thing started. It took me some time to find out who was doing it. I came up with that letter I found.

I talked to Foote & Belding, and they told me that they would get in touch with me. They broke their contract. And then I got in touch with them. Then they began giving me this stuff.

When they started it, I went off to law school. I said I've got to understand this. It's quite true I used to be a college professor, but I did not understand how the courts worked. I taught American Government, and I taught my students that the courts were honest, and there was justice in the law. I taught every student -- and I taught thousands -- that this

was the best system in the world, that nobody could cheat anybody out of anything because there was a judge there who would find what was right. That's what I taught.

When I saw it wasn't working out, I went to law school and got two law degrees, and I have been practicing law for 17 years.

So, Your Honor, in 1954 they knew about this. They knew about this when I filed the suit. The letters are there. They have not been prejudiced, Your Honor. I have been prejudiced. Some of the witnesses whom I might have had are now dead. That's the burden that I must carry on my back.

Some of the people are no longer here. The memories are very faded. It's going to be harder, not for them, it's going to be harder for me to come into a court and get their records, because they will say we only keep records for three years. There's no prejudice whatsoever to them, Your Honor.

They have run from me for 14 years, and they are now in front of you, Your Honor. And now their argument is: We have run for 14 years, we have escaped for 14 years, he has caught us, don't you think that a fellow who's able to run for 14 years has done enough? Don't you think that fellow who chased them for 14 years and hasn't caught them for 14 years has done something wrong? Don't you think that if I managed to evade and avoid this fellow for 14 years you should let me go?

THE COURT: You could have always gotten service of process in New York for 14 years if you had pursued it there.

MR. CURTIS: Your Honor, the plaintiff has the choice of a forum.

THE COURT: All right. But the defendant doesn't have to accommodate you in your choice. That's what you don't realize.

MR. CURTIS: Yes, Your Honor, but the defendant --

THE COURT: You pick the ball park, but he doesn't have to elect to play in that ball park.

MR. CURTIS: That's exactly right, Your Honor. But he can't force me to play in his ball park.

Now, he held himself out as being in business here, the telephone book shows that. Mr. McAdams was here. Mr. McAdams has given his affidavit that he was here.

THE COURT: I know your position on that. Go ahead.

MR. CURTIS: It's true I could have gone to New York. But I wasn't living in that area. I was living here.

THE COURT: Plus the fact that Judge Holtzoff was here, and he allegedly understood the theory of your case.

MR. CURTIS: He understood the theory of the case. In other words, now this was not my doing, this was Carl Shipley's. And Carl Shipley is a very fine lawyer. He's a Republican National Committeeman.

THE COURT: I have known him for some years.

MR. CURTIS: He is the one who drafted the complaint, who filed the complaint. There's nobody who can read this complaint who can say it wasn't written by a very able lawyer.

And, Your Honor, if Your Honor decides that for some reason Your Honor doesn't want to send the case to New York, then Your Honor has really no alternative but to leave the case here and force me to proceed with the case here, unless I can get a motion before Your Honor staying the process of this case until we get a determination of the case in New York.

Now, the difficulty with that, Your Honor, is Section 205 of the Civil Practices Act.

My lawyer in New York is a very able man, but it would be a great burden on me to do it that way. I must have to pay him for this work. And I must say that I'm a small lawyer, Your Honor. I've had a lot of trouble. I've been rear-ended by two cars, and I've had a fall down an elevator shaft, and I haven't been paid in two of those cases. That's what the jurisdiction is.

So, Your Honor, I do think, quite apart from what you might do later, the question is what should you do now.

I respectfully argue that there is absolutely no basis for dismissing this case without prejudice, and there is no basis for dismissing it with prejudice. The order of Judge Jones said that if I could not effect service, then it

would be dismissed without prejudice. Now that was his order.

So I then effected service. Based on that, there is no basis for dismissing it with prejudice. Now they are here before the Court, and I have done everything the Judge told me to do, and I have hundreds and hundreds of dollars on it, \$100 a trip personally up to New York so that the process would be personally served, and all the other things that I've done.

I can do no more, Your Honor, than obey the order of the Court. I obeyed the order. Judge Jones issued an order. I complied with it. That's all anybody can expect me to do.

So, Your Honor, I respectfully move that Your Honor deny these motions, and that Your Honor -- well, I must say when I say that, then I'm face to face with the fact that there are five other motions pending. Your Honor said you would only hear two.

THE COURT: That's right, Judge Jones' order reads in pertinent part as follows:

Ordered that if service on the defendant is not perfected by December 31, 1969, the cause shall be dismissed without prejudice by the Clerk on that date. What kind of service was Judge Jones thinking about if he was not thinking of personal service?

MR. CURTIS: We obtained personal service in New York, Your Honor. And based on that, Judge Waddy made the remark that since we had service in New York and we had obtained jurisdiction

over then that he would send the case on to New York and get the case out of this court. This court apparently doesn't like this case. And, Your Honor, I must say I don't like all cases.

In the interim before Your Honor came back to the bench, I went up to the Court of Appeals and filed an appeal in the case of a lady who was very dear to me who had an accident at the age of 72, died at the age of 30, and she still hadn't had her day in trial. This was due to the delay of the defendant. The defendant hadn't answered. There was a default judgment. We took a default. Then they reinstated it. While the default was still on the books, the old lady died. Now, that was certainly prejudicial to her case, the fact that the defendant hadn't answered.

As Your Honor knows from practicing law, --

THE COURT: You got service on the defendant in that case, didn't you, personal service?

MR. CURTIS: Yes, we got service.

THE COURT: It was on the basis of the personal service that you got the default judgment when the defendant didn't answer. Isn't that true?

MR. CURTIS: And then they vacated the default. After the lady died, they vacated the default.

Now, if that isn't prejudicial, Your Honor, -- I must say, Your Honor, that I sold my books here in Washington to another lawyer. And like many of the other lawyers, I'm

strongly considering leaving the jurisdiction because we cannot bring our cases up before the court on time. This was a case that showed that to me very, very clearly.

Now, what I'm going to do, whether I'll do that or not, I'm not sure.

But I did get service there. I got service here. I got in rem service over the property.

THE COURT: That is not personal service, though.

MR. CURTIS: Well, it's service under the law, Your Honor. And also when they came in and made a general appearance by responding to those pleadings, they did give me jurisdiction, they gave Your Honor jurisdiction.

THE COURT: Have you about concluded, Mr. Curtis?

MR. CURTIS: Yes. I mean -- I have concluded, Your Honor.

THE COURT: Mr. Coerper, do you have anything further?

MR. COERPER: Well, I would just respond to some of the comments made by Mr. Curtis, Your Honor.

On the question of personal service, of course we do not believe that Mr. McAdams was personally served. And if he were personally served, he was served after the time that he was employed by Foote, Cone & Belding, the defendant; and after the time that the defendant had any office in the District of Columbia.

As to our responding to other motions of the

plaintiff, including request for admissions, we filed motions with the court requesting an enlargement of time to respond to all of such motions, based on the very fact that we felt that the court did not have jurisdiction over the defendant; and we did not want that determined until the court made a determination on jurisdiction.

And the only reason we finally answered the various motions and the request for admissions was because we were ordered to do so by the court. We didn't do it voluntarily.

THE COURT: By Judge Waddy?

MR. COERPER: Well, it was actually by the pretrial examiner, Mr. Finn.

THE COURT: Mr. Finn?

MR. COERPER: Yes, Your Honor.

Your Honor, I would like to just make the final point that if this case is not dismissed with prejudice, there would be a constant opening to cases of this nature in the future which would allow an indefinite tolling of the Statute of Limitations.

In other words, you could constantly come in and seek to effect service, and then have a case reinstated, if it would be reinstated, and this would go on and on and on, there would be no end to it.

We feel that 16 years, Your Honor, is long enough for this process.

And notwithstanding all of the other comments of Mr. Curtis, it still remains that he did not go to New York where he could have acquired service on the defendant at any time during this 16-year period.

That's all, Your Honor.

THE COURT: Since the filing of this case in August of 1955, the case has been dismissed and reinstated at least three, and possibly four, times; and there have been at least 25 unsuccessful attempts at personal service.

More than 14 years after the case was originally filed, and after it had been passed upon by at least six Judges of this Court, Judges Jones, on October 20, 1969, entered an order as the result of a calendar call stating:

Ordered that if service on the defendant is not perfected by December 31, 1969, the cause shall be dismissed without prejudice by the Clerk on that date.

Subsequent to that date, in January, the plaintiff filed an affidavit of one, William McAdams, in which Mr. McAdams states, in effect, that he was an employee of Foote, Cone & Belding, Inc. during 1954 and 1955, had offices at 711 Fourteenth Street during that period, and that while he was so employed he was served with a summons and complaint in the above case by means of personal service; that he telephoned long distance to Robert Carney, President of Foote, Cone & Belding, and informed him that he had been so personally served.

and at the request of Robert Carney, he mailed the summons and complaint to the said Robert Carney.

Now, this affidavit of Mr. McAdams comes some 14 years after the alleged event.

In the second place, it was completely contra to the return of the summons, which was made by George D. Smithy, Deputy, in connection with an attempt to serve the summons in December, and the return reads:

I hereby certify that I served the summons and complaint on the therein named Foote, Cone & Belding Corporation by handing to and leaving a true correct copy therewith with Mrs. William McAdams, by authorization of plaintiff, personally, at 4545 Connecticut Avenue, Apartment 806, at 8:15 p.m. on the 8th of December, 1955.

The original of the summons indicates that the summons should be served on William D. McAdams; and as I said just previously, the return indicates that it was made on Mrs. William McAdams by authorization of the plaintiff.

In addition, there is in the record an affidavit of a Mr. Balian, a vice-president of the defendant, to the effect that McAdams was not an employee of the company at the time the alleged service was attempted; that it had no office in the District of Columbia at that time, et cetera.

Since the question of whether or not service was made

is a mixed question of law and fact for this Court to determine. I think by the overwhelming preponderance of the evidence, taking into account that some 14 years have elapsed, that personal service was not made and has not yet been made on the defendant by the plaintiff.

Since personal service has not been made up to the present time, it was not made on or before December 31, 1969, the period specified in Judge Jones' order.

In the meantime, there were various motions, to change venue, plaintiff's motion for default judgment, plaintiff's motion for further consideration of court order granting additional time to respond, defendant's motion to dismiss pursuant to Judge Jones' order of October 20th, and the defendant's motion for dismissal pursuant to the Federal Rules of Civil Procedure, 41(b), for failure to prosecute.

I am going to dismiss this action on two grounds:

One, the failure to comply with Judge Jones' order of October 20, 1969; and

Two, because of the provisions of Rule 41(b), which provides, in part:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

Mr. Moore, in his volume on Federal Practice,

Volume 2, at page 981, states, in pertinent part:

"However, where there is unwarranted delay attributable to the plaintiff in the issuance of the summons, its delivery to the marshal or person specially appointed to make service, or in the service of process, the action is subject to a motion to dismiss under Rule 41(b) in the discretion of the court for failure to prosecute."

The power of the Court to dismiss under that rule and the inherent power of the Court to dismiss an action under circumstances such as these has been recently spelled out by our Court of Appeals in the Sheaffer case, reported at 408 F.2d.

For all of the foregoing reasons, I am going to grant the defendant's motion to dismiss, and I am going to require defense counsel to prepare the order with the necessary recitals.

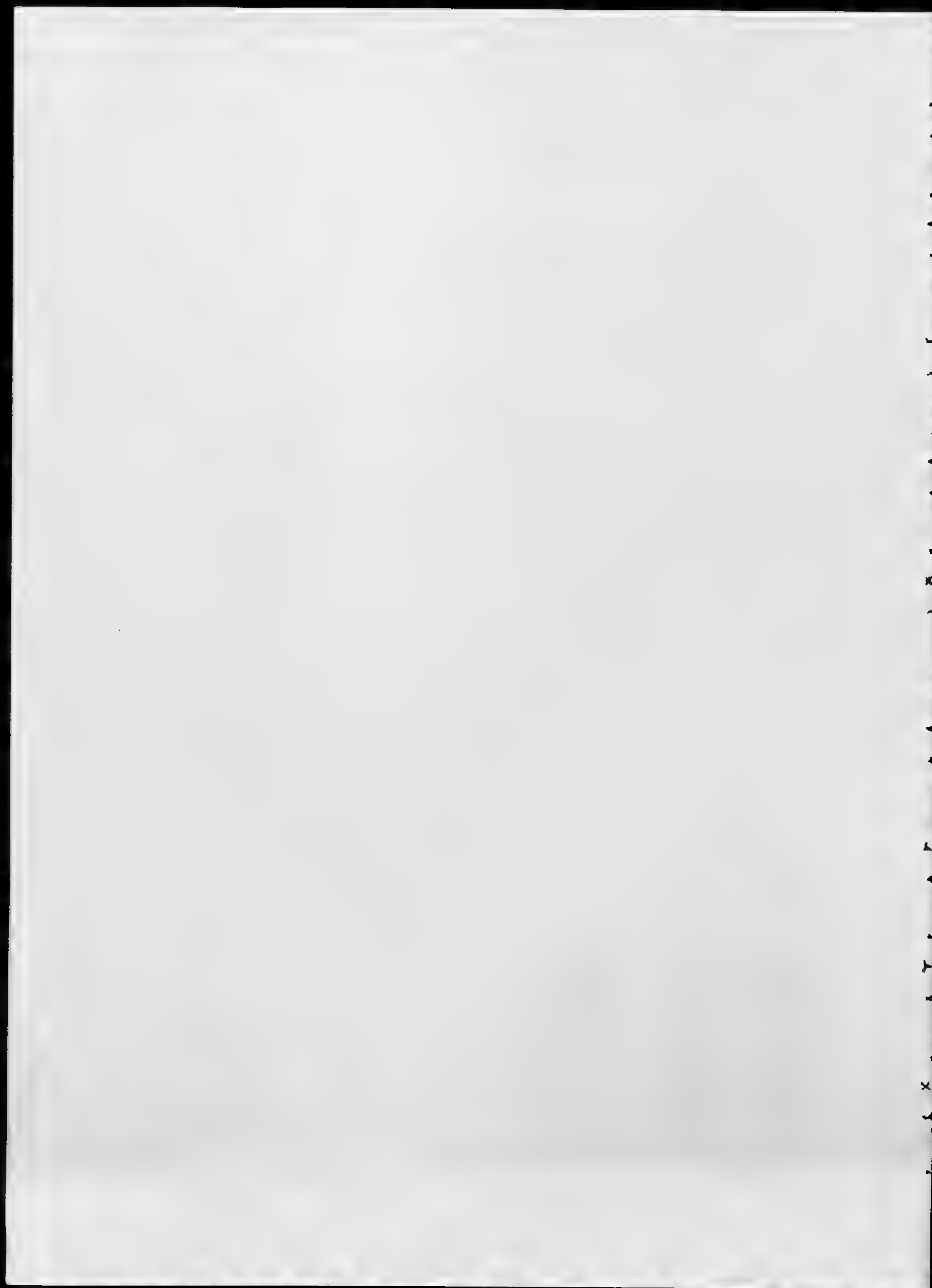
We will stand recessed for ten minutes.

MR. COERPER: Dismissed with prejudice, Your Honor?

THE COURT: Under Rule 41(b), it is dismissed with prejudice.

(Whereupon, at 2:45 p.m., the hearing was concluded.)

- - -



In The United States District Court for the District of Columbia

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Katherine K. Byrholdt, official court reporter for The United States District Court for the District of Columbia, do certify that the foregoing is the official transcript of the proceedings had in said Court in C. A. 3529-55 on 5-14-55.

Katherine K. Byrholdt
Official Court Reporter

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,572

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 9 1970

Nathan J. Paulson
CLERK

Arthur S. Curtis

816 National Press Building
Washington, D.C. 20004

Attorney for Appellants

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,572

ARTHUR S. CURTIS, t/a
A. S. CURTIS FEATURES SYNDICATE

Appellant,

v.

FOOTE, CONE & BELDING

Appellee .

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

Arthur S. Curtis
816 National Press Building
Washington, D. C. 20004

Attorney for Appellant

QUESTIONS PRESENTED

1. Whether a Plaintiff who has made 28 attempts to serve a Defendant, has attached before judgment, has filed a similar suit in another jurisdiction where the Defendant has his principal place of business, and has moved for judgment by default, should have his case dismissed under Rule 41(b) with prejudice for failure to prosecute.
2. Whether coordinate judges may overrule each other, or whether the principle of the certainty of the law requires that the Law of the Case be observed.
3. Whether a Plaintiff who has selected a forum should prevail in a Motion for a Change of Venue to the place of Defendant's regular business address in the face of an opposition by a Defendant who argues that he is not present in this jurisdiction but is present there.
4. Whether a Motion for Judgment by Default has a prior right to be heard over a Motion under 41(b) which has been later filed, and of what the hearing should consist.

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IN THE
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 24,572

ARTHUR S. CURTIS, t/a
A. S. Curtis Features Syndicate

Appellant,

v.

FOOTE, CONE & BELDING

Appellee .

Appeal from the United States District Court
for the District of Columbia.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under 28 U.S.C. 1291.

This Case has not been before this Court before.

REFERENCES TO RULINGS, RULE 8 (e)

The Rulings and Orders of the Court below, which are the subject of this Appeal, are as follows:

1. Chief Judge Curran's "Order Denying Plaintiff's Motion to Remove Judge Pratt from this Case, to Send the Case to Judge Waddy and to Send the Case to New York," next page.

2. The Orders of Judge Pratt dismissing the Case with prejudice for failure to prosecute, and denying the Motion for a change of Venue, and another for Reconsideration, also follow.

Because the above Orders are presented at this point they will not be repeated in the Appendix.

(NOTE: The motion for reconsideration filed by the plaintiff was denied not in the form of a formal order, but by writing, perpendicular to the bottom of the page in the left hand margin, "denied," followed by the date and the signature of judge pratt, therefore it is not reproduced here.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ARTHUR S. CURTIS, :
Plaintiff :
v. : CIVIL ACTION NO. 3529-55
FOOTE, CONE, AND BELDING, INC. :
Defendant. :

ORDER DENYING PLAINTIFF'S MOTION TO
REMOVE JUDGE PRATT FROM THIS CASE,
TO SEND THE CASE TO JUDGE WADDY AND
TO SEND THE CASE TO NEW YORK

Upon consideration of Plaintiff's Motion to Remove Judge Pratt from this case because of bias, to have the case sent back to Judge Waddy, and to have the case sent to New York on a Change of Venue, and the Accompanying Memorandum of Points and Authorities in support thereof, including Plaintiff's Affidavits of Bias and of Good Faith, and the said Motion having duly come on to be heard on the 1st day of June, 1970, and the Court having heard the argument of Plaintiff and being fully advised, and it appearing to the Court that Plaintiff's Motion should be denied in the interest of justice, it is this day of June, 1970

ORDERED that Plaintiff's Motion to Remove Judge Pratt from this case, to send this case to Judge Waddy, and to send the case to New York be and the same hereby is denied.

ORDER DENYING PLAINTIFF'S MOTION FOR A CHANGE OF VENUE

Upon consideration of Plaintiff's Motion for a Change of Venue to the United States District Court for the Southern District of New York (New York City) and the Accompanying Points and Authorities in support thereof and of Defendant's Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for a Change of Venue, and the said Motion having duly come on to be heard on the 14th day of May, 1970, and the Court having heard the arguments of counsel and being fully advised, and it appearing to the Court that Plaintiff's Motion should be denied in the interest of justice, it is this day of May, 1970

ORDERED that in the interest of justice the Plaintiff's Motion for a Change of Venue be and the same hereby is denied.

JUDGE

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS
WITH PREJUDICE PURSUANT TO FEDERAL RULE 41(b)

Upon consideration of Defendant's Motion to Dismiss pursuant to the Court Order filed in this action on October 20, 1969, and the Memorandum of Points and Authorities in support thereof; of Plaintiff's Opposition to said Motion and the Accompanying Points and Authorities in Support thereof; of the Defendant's Motion to Dismiss with Prejudice Pursuant to Federal Rule 41(b) and/or the Inherent Power of this Court; the Accompanying Memorandum of Points and Authorities in Support thereof; and Plaintiff's objections to Defendant's said Motion and the Accompanying Memorandum of Points and Authorities in support thereof; and the said Motions having duly come on to be heard on the 14th day of May, 1970, and the Court having heard the arguments of counsel and being fully advised, and it appearing to the Court that Plaintiff had failed to comply with the said Court Order, and had failed to prosecute the action with due diligence, it is this day of May, 1970

ORDERED that this action be and it is hereby dismissed with prejudice pursuant to Federal Rule 41(b) with costs to Defendant.

JUDGE

STATEMENT OF THE CASE

1. Appellee is a national advertising agency which has since at least 1946 had offices in New York City (see letter to Appellant from Appellee, Exhibit 1A, dated October 24, 1946, Appendix page 9).

2. At the time of the filing of this law suit in 1955, the Appellee also had offices at 711 14th Street, N.W., Washington, D. C. (see affidavit of William McAdams, its agent at that time, appendix page 38).

3. Appellant in 1955 resided in this area and had an office in Washington, D. C. and thereupon elected to file his suit in this jurisdiction alleging breach of contract, tortious misappropriation of an advertising scheme and idea after promises to pay for same if used, unfair competition, etc. (see complaint, appendix page 48).

4. Appellant, now a member of the Bar of this Court since 1958, was in earlier years a faculty member at the U.S. Naval Academy, Annapolis, Md. and thereafter a creative writer and publisher (see International World's Who's Who, 1946, Who's Who in America, 1953-1957).

5. Plaintiff below succeeded in obtaining personal service upon one William McAdams, at 4545 Connecticut Avenue, N.W., by training an attorney, and the local representative of the Defendant, but was unable to obtain the cooperation of Mr. McAdams in bringing him before the Court for a hearing upon a Motion for Judgment by Default on the Issue of Liability, inasmuch as Mr. McAdams was then receiving approximately \$1,000 per week from Defendant below (see Affidavits of William McAdams and

Arthur S. Curtis, Appendix pages 37, 38).

6. For the next 14 years, Plaintiff made ~~more than~~ ²⁸ attempts to serve the Defendant or its agents here in the District of Columbia, all without success, on at least two occasions the Case was dismissed without prejudice on the basis of the six months rule (local rule 13) but upon proper motion it was reinstated as a cause of action in each case. (see Docket Sheets, Record), *appendix, page 2 ff.*

7. Following a hearing in open court, on October 20, 1969, Judge Jones issued the following Order: (see appendix 47)

"Upon consideration of the Order to Show Cause issued on October 9, 1969, and counsel for the plaintiff being present, it is by the Court this 20th day of October, 1969,

ORDERED that if service on the defendant is not perfected by December 31, 1969, the cause shall be dismissed without prejudice by the Clerk on that date."

(signed)

Judge

8. Plaintiff managed to obtain a list of Defendant's customers which had branches in the District of Columbia and issued attachments before judgment against Sears Roebuck & Co. and Merrill, Lynch, Pierce, Fenner and Smith in sums of \$2,500. each after first obtaining permission to do so from Judge Matthews, see appendix page 46, Order appointing a special process server, see appendix page ³⁹46, response of Sears, Roebuck and Co., Garnishee, to Plaintiff's interrogatories in attachment before judgment. Merrill, Lynch never filed an answer to the attachment, but Sears Roebuck admitted that "1. At the time of service of Plaintiff's Interrogatories

in Attachment Before Judgment and Writ of Attachment served therewith, Sears, Roebuck and Co. was indebted to Defendant, Foote, Cone and Belding, Inc., in an amount in excess of \$2,500.00, the sum of Plaintiff's alleged claim against Defendant."..."2...consisting of money due for services rendered,"...

9. In December of 1969, Plaintiff filed an original suit against Defendant in New York City and obtained personal service upon the Defendant there and the Defendant has since Answered in that Case. Plaintiff also caused to be personally served in New York copies of the Attachments before Judgment which had been delivered in the District of Columbia, in order to guarantee that the Defendant had Notice. It was necessary, of course, in order to obtain permission to attach before Judgment, for Plaintiff to post bond in the sum of \$10,000. and to pay various fees, and secure the signature of a Judge. (see Appendix pages 31, 32, 44, 45)

10. Mr. William McAdams now came forward with an affidavit, which is a paper in this case, (see appendix page 38) in which he admits that at the time he was personally served, he was in fact the representative of the Defendant, that he did in fact telephone the president of the Defendant's corporation and that at the suggestion of the latter did send a copy of the Complaint to the latter. (see appendix page 38).

11. In December of 1969, the Plaintiff filed a Motion for a change of venue based upon 28 USC 1404 (A), and shortly thereafter filed a Motion for Judgment by Default based upon the affidavit of William McAdams, and filed other papers. (Appendix 36)

12. The Defendant, through local counsel, filed papers in

the case objecting to the Motion for Judgment by Default and objecting to the change of venue, requesting various continuances, and finally filing a Motion to dismiss both with and without prejudice. (see appendix page 32,28)

13. The case came on to be heard before Judge Waddy on the 18th day of March, 1970, who made the following statements:

"It appears to me that inasmuch as there is a pending case in New York which I understand to be on all fours, and where there is no question about service, that this case ought to be transferred and, if the New York Court sees fit to dismiss in the light of their Statute of Limitations, then many of these things would be disposed of." (see appendix page 59)

"Well I don't think it would be proper for this Court to dismiss with prejudice where other judges of this Court have from time to time reinstated this case. I certainly would be saying that the other judges were wrong in reinstating the case on those occasions when they reinstated the case and I do not think it would be proper for me to do such." (see appendix page 60)

"I will retain jurisdiction of this case and the Motions Clerk will set it down for the first available date after 1st April --- although I will not be sitting in Motions Court, I will retain jurisdiction." (see appendix page 66)

14. Thereafter the case was set for hearing in front of Judge Waddy in April of 1970, but the Court was not in session on that day because of the death of a wife of one of the Judges of the Court. (see appendix page)

15. The Plaintiff was then informed that the case would be heard by Judge Pratt instead of Judge Waddy. (see appendix page)

16. The Plaintiff paid the Court Reporter \$19.50 to prepare a copy of the proceedings of March 18, 1970, so that Judge Pratt would have the benefit of the observations of Judge Waddy, and the Plaintiff further checked with the Judge's secretary Miss McTierney to inform her that the transcript had been prepared by Mrs. Blair with papers in the case and to suggest that

she be certain that Judge Pratt had this available to him.
(see appendix page 56-67) (also, appendix p. 4 for R.B.G. Book)

17. At the hearing on Thursday, May 14, 1970, the Plaintiff entered the Courtroom and heard the clerks discussing the fact that there was a "1955 case in Court today." Plaintiff asked one of the clerks, "Is that bad?" and received a reply of the nod of a head. (see appendix page ____)

18. Judge Pratt then took the bench and made statements substantially to the effect that he was to hear a case which was one of the greatest travesties ever to be foisted on the Court, that approximately eight Judges had spent their time with it, that over twenty U. S. Marshalls had to serve papers, that the "buck stops here," and that he would hear only two motions today, the motion for a change of venue, and the motion to dismiss.

19. There were in fact pending before the Court numerous other Motions, including the Motion for Judgment by Default, which had been filed prior to the Motion to Dismiss.

20. The Plaintiff was taken by surprise and did not know what to do, particularly since the judge ordered that the case proceed. Plaintiff thereupon asked the Court to hear only the Motion for a change of venue at that time because he was to be at the White House and should be there by 10:30. The Plaintiff also stated to the Judge that it was the Plaintiff's conception that if the case were sent to New York on the Change of Venue Motion, the other Motions would not need to be heard. Thereupon the Motion for Change of Venue was argued and denied and Plaintiff requested until 1:30 to argue the Motion to Dismiss.

21. At 1:30 the Plaintiff addressed the Court and requested information as to whether the Court had seen the transcript of the record before Judge Waddy dated March 18, 1970, and the Judge replied that he had not. The Plaintiff then read to him the pages which are quoted above and meanwhile Miss Vaughan, the Courtroom Clerk, obtained the transcript and handed it to the Judge.

22. Plaintiff argued that the Defendant had known about this Case since its beginning, as shown not only by the affidavit of William McAdams, but also as shown by various correspondence between Plaintiff and Defendant, copies of which are found in ^{Appendix} ~~Exhibits~~ pages 21-26. Plaintiff also pointed out to the Court that under the New York Civil Practices Act, a Dismissal Without Prejudice would permit the Plaintiff here to proceed with his action in New York, while a Dismissal with Prejudice for failure to prosecute would bar a suit on the merits in New York. Thus, the Plaintiff argued that a dismissal with Prejudice would be in effect a holding on the merits without giving to the Plaintiff his constitutional rights to a trial on the merits.

23. At the conclusion of the argument the Court granted the Motion to Dismiss with Prejudice.

24. Plaintiff's Motion for Reconsideration was denied, and a subsequent motion before Chief Judge Curran, requesting relief from Judge Pratt's rulings was also denied.

25. Notice of Appeal was timely filed and this Court has graciously extended the time in which this brief can be filed.

NOTE

(26. This case was filed in this jurisdiction in the first instance because of the case of Belt v. Hamilton National Bank, D.C.D.C., 108 FSupp 689, Affd 93 USAPPDC 168, 210f2d 706.. In that case, Judge Holtzoff ruled that there was legal liability under circumstances where Belt, the plaintiff there, came to an advertising agency with an idea which was later used by the agency as a program for the bank. It was hoped that service would be effected during the lifetime of Judge Holtzoff and that he might hear this similar case.)

STATEMENT OF POINTS

1. The court erred in denying the motion for a change of venue.
2. The court erred in refusing to consider the motion for default judgment in full, before considering other matters.
3. The court erred in overruling judges with concurrent jurisdiction and thus departing from the law of the case.
4. The court erred in dismissing with prejudice for lack of diligence under 41(b) when the record showed that plaintiff had made 28 attempts to serve defendant, had negotiated with defendant before and after filing suit, had finally obtained an affidavit that service in 1955 was good service and had moved for default judgment, had filed a new suit in N.Y., had successfully and fruitfully issued Attachments before judgment, and had filed a motion to change venue under 28 U.S.C. 1404 (a) so that the two suits could be consolidated and heard in New York.
5. The court erred in dismissing under 41(b) with prejudice when it appeared that such action might deny to plaintiff a hearing on the merits of his case in New York.

SUMMARY OF ARGUMENT

1. The choice of the forum was the prerogative of the plaintiff, and under the circumstances the plaintiff's request to transfer the case to N.Y. should have been granted, since defendant had admitted that it was a New York business and was not present in this jurisdiction, and since plaintiff no longer resided here.
2. A special hearing should have been held on the motion for default judgment since the issue of liability was involved.
3. No motion to dismiss could be granted without the hearing on the default having been heard in full first.
4. It was error for Judge Pratt to overrule Judges Jones and Waddy, concurrent judges who were senior to him.
5. It was error to dismiss with prejudice under 41(b) for failure to prosecute under the circumstances of this case, where plaintiff had made 28 attempts to serve defendant and had done other things as well, and where such a dismissal might deprive plaintiff of his trial on the merits in New York; for it is public policy to dispose of cases by a trial on the merits where possible rather on doubtful procedural points.
6. Defendant was properly before the Court because of the Attachments before judgment and because it has answered to requests for Admissions.
7. This Court should reverse, and order that this case be transferred to New York under 1404(a), so that it might be consolidated with the companion case there, thus furthering the efficient administration of justice in the federal system.

ARGUMENT

CHOICE OF A FORUM WAS A PREROGATIVE OF THE PLAINTIFF

In *Gulf Oil Corp. v. Gilbert*, 330 U.S., 501, 508, the Supreme Court said that unless the balance is "strongly in favor of the defendant, the plaintiff's choice of forum shall rarely be disturbed." Similarly transfer under 1404(a) should be granted to a plaintiff who has made a proper showing unless the defendant makes a stronger showing that the case should not be moved. *Norwood v. Kirkpatrick*, 349 U.S. 29, quoting from *All States Freight, Inc. v. Modarelli*, 196 F.2d 1010, 1011 (3rd Cir. 1952):

"The forum non conveniens doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else.

In view of Judge Jones Order, Plaintiff was acting reasonably in requesting a change to New York where Defendant was present, and where the two cases could be consolidated and tried together, thus cutting by half the burden on the administration of justice within the Federal system.

ARGUMENT

THE COURT ERRED IN DENYING THE MOTION FOR A CHANGE OF VENUE

Apart from the principle of the LAW OF THE CASE, that concurrent judges must not overrule each other lest there be no certainty in the law and the law become a government of men rather than a rule of law, the grounds of the Motion for a Change of venue were sound, and should have been observed by an order granting the change of venue.

The Motion, which appears in the Appendix, and in the record at R 24, argued that the suit could have been initiated in either New York or Washington, that service in Washington had been attempted many times without success, that plaintiff no longer resided in the district, and that it was in the interest of justice and the convenience of the parties and witnesses to transfer the suit to New York, particularly since the same suit was now pending in New York and that consolidation of the two suits there would save the cost of one of the suits.

Since defendant was arguing that it was not present in D.C. but admitted that it was present in its legal capacity in New York, its argument against a change of venue should have had no standing whatsoever - in fact, defendant should have been arguing FOR a change of venue. Therefore, the Motion should have been granted.

Further, Judge Waddy's statements, found in the Appendix, clearly indicated that it was his intention to transfer the case, and had the case not been moved, it undoubtedly would have so been transferred. The Motion for a change of venue now follows.

FOOTE, CONE AND BELTING
Defendant

FILED

MOTION FOR A CHANGE OF VENUE
TO THE SOUTHERN DISTRICT OF
NEW YORK (NEW YORK CITY)

DEC 30 1969

ROBERT M. STEARNS, Clerk

The Plaintiff respectfully moves this Court to transfer this case to the Southern District of New York (New York City), for these reasons:

1. That 28 U.S.C. 1404 (a) reads as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. That in 1955 when this suit was filed in this Court, the principal office of the defendant was in New York City, at 347 Park Avenue, and that its principal office is still in New York City, where it now rents more than two full floors in the Pan Am building at 200 Park Avenue.

3. That in 1955 when this suit was filed in this Court, defendant rented an office at 711 14th St. N.W., D.C. and did business in the District of Columbia; and that Plaintiff made numerous attempts to serve defendant, all without success; that defendant then closed its D.C. office rather than appoint a registered agent as required by the then-new statute.

4. That since 1955, numerous attempts have been made to serve defendant as is reflected on the docket sheet.

5. That service by attachment before judgment has finally been effected by serving two of defendant's clients in this area, Sears, Roebuck Co., and Merrill, Lynch, Pierce, Fenner and Smith, through the use of a special process server, James Doud, Esquire, a member of the Bar of this Court, who was appointed by special order of Chief Judge Curran.

6. That as part of the Attachment Before Judgment, and as an alternative to publication against defendant, Plaintiff personally travelled to New York and the United States Marshall there personally served copies of the Attachments Before Judgment upon the defendant at its New York offices, as

is shown by the papers in this case and copies of the Marshall's return which is attached hereto.

7. That there was filed on 23 December 1969 in the Southern District of New York (New York City), an entirely new suit by plaintiff against defendant, identical to the present suit, and that the defendant has already been served in New York with copies of this suit, Civil Action 69 - 5648, as is shown by the U.S. Marshall's return. reproduced herewith as an exhibit.

8. That the parties are now litigating in two jurisdictions, here and in New York, over the same case.

9. That Plaintiff has employed astute counsel in New York to represent him, one Stanley M. Estrow, age 60, who has spent his legal life in the publications, advertising, and graphic arts fields; and, that defendant has legal counsel in New York as well.

10. That Plaintiff is no longer a resident of the District of Columbia; and that he is required, as a matter of recentering the publishing business, to make frequent business trips to New York.

11. That on best knowledge and belief, all or almost all of the witnesses in this case are in New York.

12. That it is presently more convenient to both parties to have this case transferred to New York, and more convenient also to the witnesses, particularly if the two cases were consolidated there, so that in one litigation there might be brought about the resolution of their differences without the excessive cost of overlapping and duplication in discovery, witnesses, and trials.

13. That it would be in the interest of justice to transfer this case to New York, to avoid the expenses and loss of time described in 12, above.

14. That this Court has authority under 28 U.S.C. 1404 (a) and the cases decided thereunder, to grant the relief requested.

ARGUMENT

THE MOTION TO DISMISS WITH PREJUDICE
COULD NOT BE GRANTED UNTIL THERE WAS
A FACTUAL HEARING BEFORE A JURY ON
WHETHER WILLIAM McADAMS SPOKE THE
TRUTH IN HIS AFFIDAVIT, THUS MAKING
A JUDGMENT BY DEFAULT IN FAVOR OF THE
PLAINTIFF A PROPER ORDER.

There was before the Court the Motion for a Judgment by Default which was based upon the affidavit of Mr. McAdams that he had been properly served at a time when he represented the Defendant, and there was also an affidavit by the Plaintiff that he had not moved forward with the Default because he was unable to obtain the testimony earlier of Mr. McAdams.

This Motion had a priority over all others because if it were decided in Plaintiff's favor, Defendant was no longer privileged to present evidence on or contest its liability. By filing counter affidavits the Defendant presented the Court with a square issue of fact which could only be resolved by a jury, since issues of fact are for the jury only.

Under these circumstances it was error to grant the motion to dismiss with prejudice, since a full hearing might have disclosed a willful attempt by Defendant to defeat the Case by claiming that it had not been served, when in fact it had been served.

Since there was a possible state of facts under which the Plaintiff might recover, the Motion to Dismiss should have been denied. Conley v. Gibson 355U.S.41, 2 L.Ed.2d 80. "Before granting of motion to dismiss a complaint it must appear to a certainty that plaintiff is not entitled to relief under any state of facts which could be proved to support his claim," Schenley Industries, Inc. v. N. J. Wine & Spirit Wholesalers Ass'n, D.C. N.J. 1967, 272 F. Supp. 872.

IT WAS ERROR NOT TO HOLD A HEARING SPECIALLY
ON THE MOTION FOR DEFAULT JUDGMENT

The record clearly showed that the U.S. Marshall had delivered the summons and complaint to "McAdams" at 4545 Connecticut Ave NW., D.C., Apt. 806, the address of William McAdams as shown in the telephone book of that year. The record, page 5, shows that a motion for default judgment was made on March 7, 1956 by Carl L. Shipley, attorney for the plaintiff, but that no hearing was held; as is explained in the second motion for default judgment, filed in 1970, by affidavit of the plaintiff, plaintiff was unable to secure the testimony of Mr. McAdams until 1970.

The Marshall's return seems to say that he served MRS. McAdams; the Affidavit of Mr. McAdams says that he was personally served; under the rules, service at the household of a person to an adult is good service, so that whether served on Mr. or Mrs McAdams, the service on him was good.

The matter was important enough to call in the witnesses namely the affiants for questioning in open court, since a ruling that service was good would have ended the issue of liability. Alternatively, the matter of service and agency was an issue of fact for a jury. In either case, the matter was sufficiently important to receive a hearing in its own right. Not to do so was error.

The Marshall's Return and the motion for default judgment follow this page, and to avoid duplication do not appear in the Appendix.

U. S. MARSHAL'S RETURN OF SERVICE

United States of America

DISTRICT OF COLUMBIA

Carter

vs.

Clerk's No. 3579-55

U. S. Marshal No. _____

Received by U. S. M. _____

(Date and time)

I hereby certify and return that I served the annexed _____
on the therein-named _____
(Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with _____
by authentication of _____

personally at _____
(Address—Street number, apartment number)

(City)

in the said District

at _____

a. m.—p. m., on the _____

day of _____

1955

Marshal's fees _____

Mileage _____

Paul E. J. R. M.
United States Marshal

By _____
Deputy

FILED

DEC 9 - 1955

HART & HILL, CLERK

I hereby certify and return that I served the annexed _____
on the therein-named _____
(Individual, company, corporation, etc.)

by handing to and leaving a true and correct copy thereof with _____

personally at _____
(Address—Street number, apartment number)

(City)

in the said District

at _____

a. m.—p. m., on the _____

day of _____

19____

ARTEUR S. CURTIS
t/a A. S. CURTIS FEATURE SYNDICATE
1319 F Street, N. W.
Washington, D. C.

Plaintiff

vs.

C. A. NO. 3529-55

FOOTE, COKE, AND BELDING
Room 622, 711 14th St., N. W.
Washington, D. C.

Defendant

MOTION FOR DEFAULT JUDGMENT

Comes now plaintiff and moves this Court for entry of judgment in default of answer or other proper pleading by defendant within time specified in the summons.



Carl L. Shipley

CERTIFICATE OF SERVICE

I hereby certify that I have this date mailed to Foote, Cone, and Belding, C/o Wm. D. McAdams, 4545 Connecticut Ave., N. W., a copy of the foregoing.



Carl L. Shipley

ARGUMENT

THE RULING OF JUDGE PRATT IS PREJUDICIAL AND ERRONEOUS BECAUSE IT IS CONTRARY TO THE ESTABLISHED RULES OF THE "LAW OF THE CASE," AND IS CONTRARY TO THE CASE OF U.S. v. KAYE, NO. 22,543, (June 30, 1970)

The Fathers of this Republic sought to set up a government of laws and not of men. The idea behind this principle was to eliminate human bias and prejudice and create a rule of law rather than a rule of men. Basically, this is another way of stating the theory behind what is known as "THE LAW OF THE CASE."

It is a fairly well-established rule of law that a ruling made by one Judge of the same Court in a given case is the "LAW OF THE CASE", and the correctness of that ruling will not be reviewed. Crittenden v. Atkinson, 1940, D. C. D. C. 1934, 1 S.C.D.C. (N.S.) 178; accord, Williams v. New Jersey-New York Transit Co., D.C.N.Y. 1940, 1 F.R.D. 138; Basevi v. Edward O'Toole Co., D.C.N.Y. 1939, 26 F.Supp. 41; American Fomon Co. v. United Dyewood Corp., D.C.N.Y. 1940, 1 F.R.D. 171.

In other words, a Judge is bound by a previous decision of another Judge of the same Court, in the same case, and on the same matter, and will not subsequently overrule the prior decision on the same matter.

The statements quoted from Judge Waddy's hearing of March 18, 1970, show that rulings had already been made though not officially in the form of an order, to the effect that the Motions to Dismiss would be denied and that a Motion for a change of venue would be granted.

Further Judge Jones ruled in his order that in the event that Curtis was unable to effect service by January 1, 1970, that the case would be dismissed "WITHOUT PREJUDICE."

Judge Pratt overruled both Judge Waddy and Judge Jones, thereby setting himself up as a senior to them and acting contrary to the "LAW OF THE CASE."

It was clearly prejudicial to the Plaintiff to transfer the case away from Judge Waddy after he had stated for the record that he would rule in favor of the Plaintiff on the Motion for a Change of Venue. To have done so, if done intentionally by counsel would amount to an offense known as "SHOPPING FOR JUDGES," since by moving the case from Judge to Judge one could change the result and destroy the uniformity of the law.

U.S. v. Kaye, No. 22,543, decided June 30, 1970 by this Court, is another case where, as in this case, Judge Pratt overruled Judge Jones. In the Kaye case, on July 19, 1968, Judge Jones granted a motion to suppress a Bell and Howell projector, on the ground that the warrant did not authorize search of the apartment over the store. On August 20 and 21, 1968, however, Judge Pratt heard and granted the government's motion to reconsider the ruling of Judge Jones; and after hearing testimony Judge Pratt denied the motion to suppress the projector. In reversing Judge Pratt and reinstating Judge Jones' ruling, this Court held that "Judge Jones was correct and Judge Pratt's ruling was the result of misunderstanding and confusion"... Chief Judge Bazelon, concurring, said that .

"The proper administration of judges in this circuit requires us to say that the Government did not advance sufficient justification to warrant the trial judge in reconsidering another judge's prior order..."

In this case, where eight judges have sat on the Case prior to Judge Pratt, where Judge Jones ordered that if service were not effected by Dec. 31, 1969 the Case would be dismissed Without

Page 3.

prejudice, and where Judge Waddy had indicated that the case would be sent to New York, the dismissal with prejudice by Judge Pratt was clearly contrary to the Law of the Case, was clearly erroneous, and should be reversed.

ARGUMENT

SINCE FUNDS CONSTRUCTIVELY IN THE HANDS OF THE DEFENDANT HAD BEEN PROPERLY ATTACHED, THE MOTION TO DISMISS WAS ERRONEOUSLY GRANTED.

A. Attachment Before Judgment has been properly proceeded under in accordance with Title 16 of the D. C. Code.

B. Sears Roebuck has answered, stating that it has substantially more than \$2,500. in its possession which it owes for services rendered by the Defendant. Therefore, the Case is in position for a Judgment of Condemnation in the event that Defendant in fact were to choose not to make an appearance and defend the Case.

C. Under Title 16 - (old provision, 16-319), since Defendant has been served with process, final judgment against the garnishees "shall not be rendered until the action against the defendant is determined." Therefore, Plaintiff cannot move for the Judgment of Condemnation until the validity of the service in 1955 is determined as part of the Motion for Judgment by Default. Meanwhile, however, failure to reply to the Attachment presumes that funds owed to defendant are in the hands of the garnishee, and thus are constructively in the hands of this Court. Levy upon the property of the defendant confers jurisdiction upon the Court, *Moses v. Hayes*, 36 App. D.C. 194. In the event that this Court holds that the service upon William McAdams was not good, then plaintiff would apply for a judgment of condemnation and bring the attached property out of the hands of the garnishees, unless defendant answered. Defendant cannot move to dismiss as a means of defeating an Attachment Before Judgment, when Defendant is a Non Resident and the exact purpose of the Statutes is to provide a remedy against Nonresidents by attachment before judgment.

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ARGUMENT

THE MOTION TO DISMISS SHOULD HAVE BEEN DENIED BECAUSE DEFENDANT HAD SUBMITTED TO THE JURISDICTION OF THIS COURT IN FILING ITS PLEADINGS.

The gist of Defendant's argument is two-fold, namely that Plaintiff was not diligent and therefore Defendant has been hurt in that it will be harder to prepare its case, and secondly, that the Defendant is not properly before the Court because it has never properly served.

The answer to the first argument is clearly that Defendant has known about this Case since 1955 and has had 15 years to get ready with its defenses therefore it cannot say that its defenses have been hurt, particularly when it could have filed an answer at any time after service of the Complaint upon William McAdams.

The answer to the second argument made by Defendant is, that by filing objections to the Motion for Judgment by Default, and by filing requests for continuances, the Defendant in fact submitted itself to the jurisdiction of the Court. See Judge Fahy's Opinion in North Branch Products, Inc. v W. Reuen Fisher, No. 15663, decided Nov. 15, 1960, in which the Court said, not only expressed concern over the rights of the plaintiff to a trial on the merits, but stated that by filing pleadings the defendant submitted to the jurisdiction of the Court.

The record shows that defendant answered the request for Admissions, and thus entered an appearance in the case. See Appendix.

ARGUMENT

THE DISMISSAL WITH PREJUDICE SHOULD BE REVERSED BECAUSE IT MIGHT BAR THE RIGHTS OF THE PLAINTIFF TO A TRIAL ON THE MERITS IN THE NEW YORK CASE.

Section 205 of the New York Civil Practice Law and Rules states as follows:

"205 Termination of action

(a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same cause of action within six months after the termination."

Following the outcome of the Case below, the Defendant filed a Motion for Summary Judgment in the United States District Court for the Southern District of New York, where the Case is known as 69 Civ. 5645 and where parties and actions are identical with this case. It is arguing there that the New York case should not have a trial on the merits because of the rulings on 41(b) here. This argument is set forth fully in the exhibits but is repeated in part here as follows:

"POINT I.

DISMISSAL WITH PREJUDICE PURSUANT TO RULE 41(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE OPERATES AS AN ADJUDICATION UPON THE MERITS, THEREBY BARRING THE PRESENT ACTION UNDER THE DOCTRINE OF RES JUDICATA

Rule 41(b) of the Federal Rules of Civil Procedure, in its pertinent section, provides as follows:

...Unless the Court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

The United States District Court for the District of Columbia

in its order dismissing plaintiff's August 1955 action specified that such dismissal was "with prejudice", thereby unequivocally expressing its intention that the dismissal order be considered an adjudication upon the merits of plaintiff's claims. As such, plaintiff is forever barred from maintaining another action based upon the same claims set forth in his August 1955 action. Jameson v. Du Comb, 275 F.2d 293 (7th Cir. 1960); A. B. Dick v. Marr, 197 F.2d, 498, 502 (2d Cir. 1952); Larsen v. O'Reilly, 11 F.R.D. 604 (S.D.N.Y. 1951)."

It is respectfully submitted, therefore, that unless this Court wishes to foreclose a Hearing on the Merits in the New York Case, or depart from the reasoning of Judge Fahy in the North Branch Products Case where he expressed a concern over the rights by the Plaintiff to hearing on the merits, this Court should modify the orders below either by transferring the Case to New York or else by conforming the final orders to the original order by Judge Jones that the Case be dismissed WITHOUT PREJUDICE. Because of the Attachments Before Judgment, the first alternative appears more in keeping in the interest of an economical administration of justice, since the Defendant has a place of business in New York, the garnishees both have places of business in New York, and the Plaintiff is willing to come to New York to try his case.



CONCLUSION

The Defendant has known about this action since 1955 and has communicated with Plaintiff about it, and was free to file an answer throughout the long period of about 14 years when the Plaintiff made over 28 attempts to process the action in Washington. The Plaintiff has finally taken the Case to New York in a new action and has moved to transfer this Case to New York so that it may be consolidated with the Case there.

Plaintiff has also filed a Motion for Judgment by Default based upon the Affidavit of William McAdams.

In the context of this Case, the rulings below are erroneous and should be reversed. Either the Motion to Transfer to New York under 28 USC, 1404(a) should be granted and the Motion to Dismiss denied, or else the Case should be sent back for trial before a jury since there is a material issue of fact as to whether the Defendant was in fact served properly through service upon William McAdams.

Since everything can be decided in one case in the New York jurisdiction, since the Defendant admits that it is there and denies that it is here, and since Plaintiff is willing to go to New York to find justice, the Case should be transferred to New York. The record shows that the Plaintiff has been exceptionally diligent for 14 years and under these circumstances, particularly in the light of the rulings of Judge Jones and Judge Waddy, Plaintiff should not be denied a Trial on the Merits.

This Court should grant relief in keeping with the above.

Respectfully submitted,

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,572

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

MILO G. COOPER

COUDERT BROTHERS

One Farragut Square South
Washington, D. C. 20006

Attorneys for Appellee

EUGENE L. GIRDEN

TIMOTHY K. HART

COUDERT BROTHERS

200 Park Avenue

New York, New York 10017

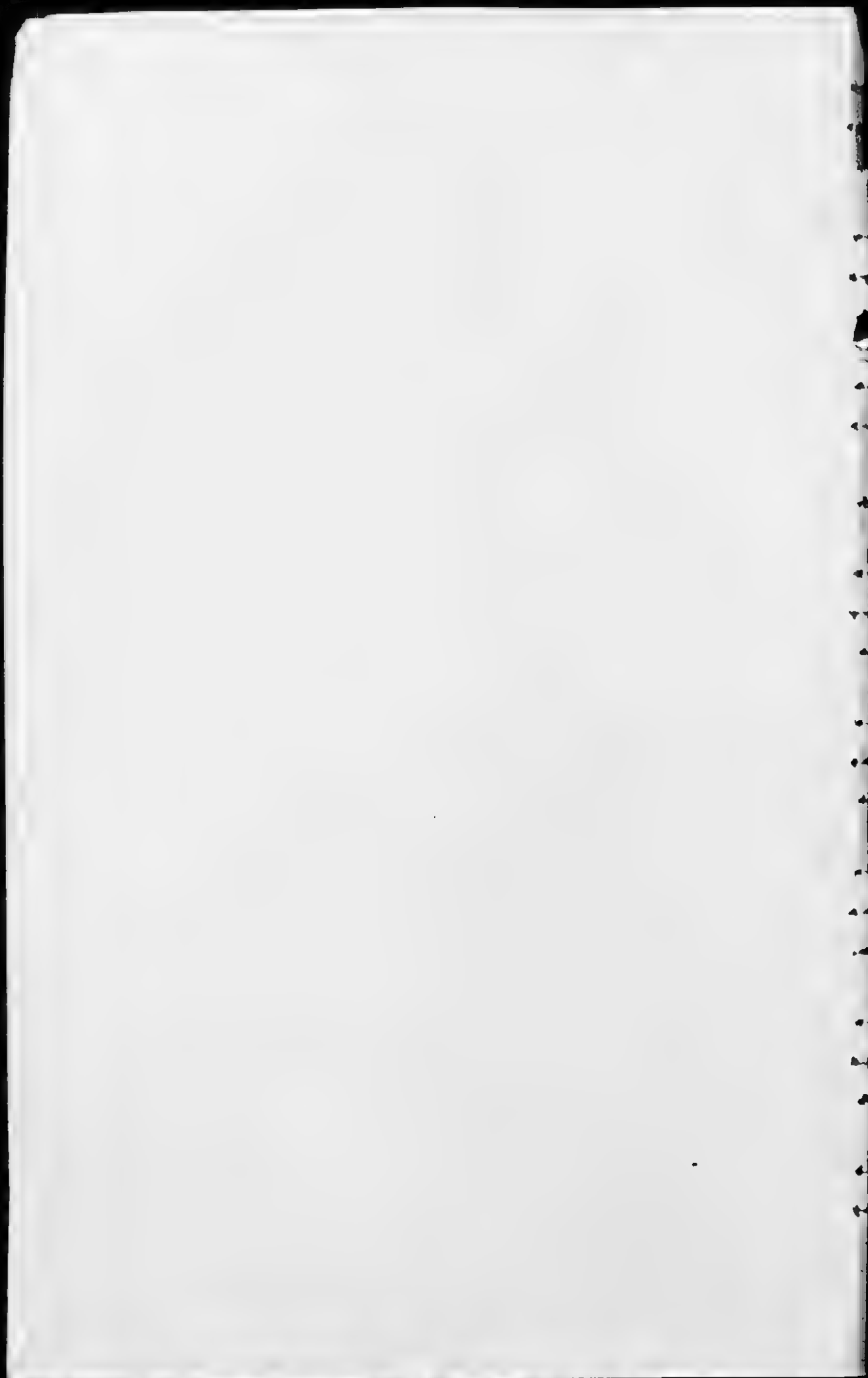
Of Counsel

United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 13 1971

Nathan J. Pashon

CLERK



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,572

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

Questions Presented

1. Was the District Court, Pratt, J. correct in denying Plaintiff's Motion for a Change of Venue to the United States District Court for the Southern District of New York?

2. Was the District Court, Pratt, J. correct in granting Defendant's Motion to Dismiss this action with prejudice

(a) for failure to comply with the October 20, 1969 Order of Jones, J.;

(b) pursuant to Rule 41(b) FRCP and the Inherent Power of the District Court to dismiss for failure to prosecute with due diligence?

3. Was the District Court, Pratt, J. correct in denying Plaintiff's Motion for Reconsideration of the Orders denying Plaintiff's Motion for Change of Venue and granting Defendant's Motion to Dismiss?

4. Was the District Court, Curran, C.J. correct in denying Plaintiff's Motion (a) to remove Judge Pratt from this case because of bias; (b) to have the case referred back to Judge Waddy and (c) to have the case sent to New York on a Change of Venue?

The instant case was not previously before this Court

Statement¹

Plaintiff herein appeals from various Orders of the United States District Court for the District of Columbia denying his motion for a change of venue to the United States District Court for the Southern District of New York, granting defendant's motion to dismiss, and denying various of plaintiff's multitudinous motions for relief from the two aforesaid Orders. In effect, plaintiff is appealing from these Orders which have finally terminated a litigation commenced by plaintiff almost sixteen years ago without ever obtaining personal jurisdiction over the defendant.

Since entry of the Orders herein appealed from (May 25, 1970) plaintiff has resorted to the following obfuscatory and dilatory tactics:

1. Moved before Chief Judge Curran to remove Judge Pratt from this case because of bias and for other reasons,

¹ Throughout this brief we will refer to the appellant as "plaintiff" or by his name, to the appellee as "defendant", to the purported Appendix as "(A.)" and to the purported Supplemental Appendix as "(S.A.)".

to send the case back to Judge Waddy, and to grant plaintiff a change of venue already denied by Judge Pratt (A. 11). This motion was denied (S.A. 29).

2. Moved for a rehearing (S.A. 24). This motion was denied by Judge Pratt on May 19, 1970.

3. Objected to the form of the Orders presented by defendants (A. 12).

4. Moved on September 19, 1970 for additional time to file plaintiff's brief and appendix. An extension was granted to January 3, 1971.

5. On December 10, 1970 plaintiff served a purported Appendix which was replete with omissions of material proceedings, especially the total transcript of the May 14, 1970 hearing before Judge Pratt. This necessitated defendant moving to compel plaintiff to file a new Appendix encompassing the entire record in view of plaintiff's failure to conform to Rule 30(b) of the Federal Rules of Appellate Procedure and Local Rule 9. On June 17, 1971 the United States Court of Appeals for the District of Columbia Circuit granted defendant's motion to require plaintiff to file a new Appendix encompassing the entire record including the entire transcript of the hearing before Judge Pratt.

6. On June 27, 1971 plaintiff moved for additional time to file a Supplemental Appendix, to require defendant to pay for the Supplemental Appendix, and unbelievably to add an additional legal argument to his appeal. On October 5, 1971 the United States Court of Appeals for the District of Columbia Circuit denied all of plaintiff's motions and ordered plaintiff to file the Supplemental Appendix by October 15, 1971. Plaintiff has since filed a purported Supplemental Appendix which is still replete with omissions and is in flagrant disregard of the Order of this Court requiring the entire record to be filed.

Rather than perpetuate this farce, defendant wishes to have this appeal finally heard on the merits, and will attempt to cure some of the defects of the Appendix and Supplemental Appendix by the use of appendices to this brief.

Statement of Facts

Plaintiff filed a Complaint in this Court on August 5, 1955 (A. 48). A Summons was issued on December 5, 1955. It was served "on the therein-named Foote, Cone & Belding, a corporation, by handing to and leaving a true and correct copy thereof with *Mrs. Wm. McAdams by authorization of Plaintiff* personally at 4545 Conn. Ave., Apt. 806, in the said District at 8:15 p.m. on the 8th day of December 1955" (S.A. 1). The case was dismissed without prejudice on September 26, 1956, for failure to prosecute, pursuant to Local Rule 13. Plaintiff filed a Motion to Reinstate on October 2, 1956 (S.A. 3). The Motion was called and Plaintiff did not respond and the Motion was dismissed for want of prosecution on October 19, 1956 (S.A. 4). Plaintiff filed another Motion to Reinstate on October 22, 1956 (S.A. 5). This Motion was granted on November 9, 1956 (S.A. 6). On February 14, 1957, Plaintiff's counsel withdrew from the case and Plaintiff commenced to act as his own counsel.

On September 9, 1957, at Plaintiff's request, a new Summons was issued, to be served on the Defendant and was returned "Not to be Found in My District" by the U. S. Marshal. Numerous additional efforts were made by Plaintiff to serve the Defendant in the District of Columbia, all being returned "Not Found." Notwithstanding this fact, at no time did Plaintiff attempt to bring this action in New York City, where he knew Defendant could be found.

On June 16, 1959, the case was again dismissed without prejudice for failure to prosecute, pursuant to Local Rule 13. On June 17, 1959, Plaintiff for the third time

moved to reinstate (S.A. 7) and the case was reinstated by Order of Court on September 10, 1959 (S.A. 8).

On October 1, 1963, the case was again dismissed without prejudice for failure to prosecute, pursuant to Local Rule 13, and for the fourth time Plaintiff moved to reinstate (S.A. 9) and the case was reinstated by Order of Court on October 7, 1963 (S.A. 10).

On October 9, 1969, this Court issued a Rule to Show Cause why this action should not be dismissed (S.A. 11) and on October 20, 1969 "ORDERED that if service on the Defendant is not perfected by December 31, 1969, the case should be dismissed without prejudice by the Clerk on that date" (S.A. 12).

On December 17, 1969, Plaintiff moved for Leave to Amend the Complaint and to appoint a special process server (A. 46), which Motions were granted.

On December 22, 1969, apparently Plaintiff had his Amended Complaint and Attachments before Judgment as to Merrill Lynch Pierce Fenner & Smith Inc. and Sears Roebuck and Company served on the Defendant, Foote, Cone & Belding, Inc., by leaving a copy with Mr. Balian, Vice President, Administration, in New York City (A. 40, 41).

On January 9, 1970, Defendant sought and was granted an Enlargement of Time to File an Answer or Motion addressed to the question of the Court's jurisdiction over the Defendant.

On January 21, 1970 Defendant filed a Motion to Dismiss, based on the October 20, 1969 Order of Jones J., requiring a perfection of service prior to December 31, 1969 (A. 32) and on February 16, 1971 Defendant moved to dismiss the action with prejudice pursuant to Rule 41(b) FRCP and the inherent power of this Court (A. 28).

On March 18, 1970 various motions were argued in part before Judge Waddy, all pending motions were continued,

and no rulings or decisions were rendered by Judge Waddy (A. 56-67).

On May 14, 1970 a full hearing was had before Judge Pratt on Plaintiff's motion for a change of venue and Defendant's motion to dismiss under Rule 41(b) FRCP (S.A. Official Transcript 1-58). This was the first and only time that a full hearing was had with all material documents and evidence before the Court.

Summary Statement of Defendant's Argument

Both Plaintiff's motion for a change of venue and Defendant's motion to dismiss the complaint were properly before Judge Pratt on May 14, 1970, Judge Pratt rendered a full hearing on both motions, and based on all of the facts and law adduced properly denied Plaintiff's motion for a change of venue and granted Defendant's motion to dismiss the complaint. There was absolutely no abuse of discretion on the part of Judge Pratt and accordingly, Judge Pratt was correct in denying Plaintiff's motion for reconsideration and Chief Judge Curran was correct in denying Plaintiff's various motions to disqualify and overrule Judge Pratt.

ARGUMENT

POINT I

The District Court was correct in denying plaintiff's motion for a change of venue.

It is defendant's position that a transfer of venue in this case would have been anything but "in the interest of justice", the controlling and overriding concern on requests of this nature. As we shall show, this was no ordinary request for a change of venue for convenience of the par-

ties, but was merely a blatant attempt by plaintiff to circumvent the Statute of Limitations and avoid the justifiable sanction of this Court for his unconscionable neglect and delay of sixteen years.

It would appear from plaintiff's position that the convenience of at least plaintiff would indeed be served by such a transfer; but, in this case, "convenience" must defer to justice. To permit plaintiff to succeed in this travesty despite his total lack of diligence and the obvious prejudice to defendant, would condone the exact conduct that the Federal Rules of Civil Procedure and local court rules were adopted to prevent and would place the defendant in the untenable position of defending a stale claim going back as far as 1948 where through no fault of defendant its defense would be hampered by the attrition of witnesses and total impossibility of recollection of facts.

A brief review of the history of this case will convincingly demonstrate the legitimacy of defendant's position. This action was commenced by the filing of a complaint in this Court on August 5, 1955. Thereafter at various times the action was dismissed in accordance with Local Rule 13 for failure to prosecute and each time reinstated upon *ex parte* application made by plaintiff.

It is important to note the completely inconsistent *ex parte* positions taken by plaintiff throughout the course of this litigation. Of particular interest is the content of his application for reinstatement in 1956 after a local Rule 13 dismissal. He requested reinstatement on the express grounds that defendant had in fact been served in December of 1955, that defendant had defaulted, and that plaintiff had filed a motion for judgment by default which because of a clerical error—failure to submit a motion card—had never come up for hearing. One would naturally expect that after obtaining this reinstatement plaintiff would pursue this course and, in fact, obtain a judgment by default.

Instead, plaintiff again had a new summons and complaint issued by the court for attempted service on defendant and there was no further attempt to prosecute the motion for default. During the next few years, plaintiff made various attempts to serve defendant after having first received a dismissal notice under local Rule 13. In each case the summons and complaint were properly returned noting that defendant was not to be found in the district. In June of 1959, the action was again dismissed and as usual plaintiff made a motion for reinstatement, on grounds entirely different than those in 1956. Plaintiff asserted that he had been attempting to serve defendant since the complaint was filed in 1955 and that he believed defendant was present in the district but was secreting itself to avoid service. In addition, he claimed that it would be an injustice to refuse reinstatement since he had not been given normal Rule 13 notice and had been ill during this period. The court order reinstating the action indicated that the motion was granted "for good cause shown, and upon papers read".

Plaintiff continued on this course (only issuing a new summons and complaint after receiving the notice of the court) until October, 1963, when the action was again dismissed for failure to prosecute. A subsequent motion for reinstatement was made and thereafter granted on October 7, 1963. Subsequently, plaintiff resumed his self-serving pattern of attempting service at intervals sufficient to satisfy Rule 13 until October, 1969 when he was faced with an order to show cause why this case should not be dismissed once and for all.

When faced with the finality of the order of Judge Jones in October of 1969, plaintiff proceeded to institute a new action in the District Court for the Southern District of New York (which has been time barred since at least 1957) and at the same time had an order of attachment issued against debtors of defendant (Sears-Roebuck, Merrill

Lynch) with offices in the District of Columbia. Plaintiff's purpose was obvious; he admitted that he knew at this time (as he had or should have known since the commencement of this action) that defendant was not amenable to service of process in the District of Columbia and impliedly that the Statute of Limitations would preclude recovery should another independent action be instituted in the District Court of New York where plaintiff was amenable to process and venue was proper. Plaintiff, therefore, had to in some way, preserve the tolling of the Statute of Limitations which had occurred when the original complaint was filed in the District of Columbia in 1955.

Plaintiff seeks to accomplish this preservation and transfer of the timely commencement date by connecting the District of Columbia action with the one brought in the Southern District of New York in December of 1969.

This seemingly innocuous motion was merely an attempt by plaintiff to cloud the true issue before this court and Judge Pratt's denial confirmed defendant's position that the interest of justice would not be served by condoning plaintiff's dilatory subterfuge.

A. It is a clear and firmly established principle of the law that in order to consider plaintiff's motion for transfer of venue, there must be subject matter jurisdiction.

A review of paragraph 1 of plaintiff's complaint indicates an obvious attempt by plaintiff to plead diversity of citizenship as the basis for the court's jurisdiction. Although the allegation of diverse citizenship is deficient for failing to negate the possibility that defendant was incorporated in the District of Columbia, the actual fact then and now is that such diversity exists. We are more concerned, however, with the minimum amount portion of the jurisdictional requirement. Defendant is fully aware that the requisite subject matter jurisdiction is to be deter-

mined by the facts extant at the time the action is commenced; in this case 1955. At that time the amount in controversy exceeded the \$3,000 jurisdiction minimum limit which was by law required in order to invest the district court with subject matter jurisdiction in a diversity suit. Since the commencement of this suit the law has changed and the minimum amount now required is \$10,000. This in itself would not be fatal since plaintiff's ad damnum clause is in excess of that amount. But, in December of 1969 plaintiff changed the nature of this action from one seeking in personam jurisdiction over defendant to one in which this court is asked to exercise original quasi in rem jurisdiction. Until the 1963 amendment of Rule 4(e) of the Federal Rules of Civil Procedure, a plaintiff could not institute an original quasi in rem action in a Federal District Court. This is again a change in the law, but we suspect from the circumstances that this court would consider this permissible since the action did not take on this character until 1969.

We must now decide what basis is to be used to determine whether the amount in controversy actually exceeds the present \$10,000 limit. In general, the cases indicate that so long as the claim made exceeds the jurisdictional sum even though the actual property seized under the property attachment writ is less than the jurisdictional amount, jurisdiction will be sustained. On the surface, this rule would seem to controvert the position defendant now takes that the amount of attached property is insufficient to confer subject matter jurisdiction on the court. However, the cases cited in support of that position are not as broad as the language would indicate.

In *Randall v. Becton-Dickinson Co.*, 18 F. 2d 631 (D.C. Mass. 1927) the plaintiff attached all goods, effects and credits in the hands of a garnishee at the time of service of process upon them up to \$250,000 (pp. 632-633). This was clearly above the jurisdictional amount. The court

determined that although the actual property attachment was less than the jurisdictional amount, it could not be conclusively determined that further funds would not become available and thus actually exceed the jurisdictional amount.

In *Sol Kantor v. Comet Press Books Corp.*, 187 F. Supp. 321 (S.D.N.Y. 1960), the court stated the reason in the form of a test. It asked "whether it appears as a matter of legal certainty that the plaintiff could not recover the amount claimed." *Id.* at 322.

It is the defendant's position, that since plaintiff has only requested Merrill Lynch and Sears Roebuck to hold funds up to an amount of \$5,000 (\$2,500 each) that it is impossible for plaintiff to recover the amount claimed in the pleadings or an amount equivalent to the \$10,000 minimum. Unlike the *Randall* case, any additional funds which become available could not apply to increase the attached amount.

It is axiomatic that Federal jurisdiction over the subject matter relates to the power of the court to hear and determine the matter in litigation. The court, without power over the subject matter is unable to rule on a motion for transfer of venue and in fact, does not even approach the question having made the threshold determination that subject matter jurisdiction does not exist.

B. An analysis of the purposes of the provisions permitting change in venue as well as the Federal Rule of Civil Procedure clearly demonstrates that the change of venue requested by plaintiff should be denied.

It is not our purpose at this point to show that venue was properly or improperly laid in the District Court of the District of Columbia. At the commencement of the suit in 1955 under the applicable provisions then in force, venue was perhaps proper since plaintiff was allegedly a resident

of the District of Columbia. As of December 1969, however, because of plaintiff's changed residence, it would appear that venue could not be then properly placed in this court. There is no question that venue would at all times, since the commencement of this suit, have been proper in the New York District Court. The fact that New York venue would be proper should have no bearing on this court's determination except inasmuch as it indicates that plaintiff had this alternative forum available for the past sixteen years. Indeed, Delaware, defendant's state of incorporation would have also been suitable for venue purposes. We wish to point out to the court that inextricably woven into the issues now before this court are issues of due process, abuse of Federal procedures and extremely prejudicial conduct on the part of plaintiff which mandate denial of this motion. Plaintiff has purposely chosen to request change of venue not for the avowed purposes of convenience, but merely as a means of avoiding the procedural sanctions which would follow a consideration of our companion motion to dismiss for lack of due diligence by plaintiff in the prosecution of his claim.

Defendant is fully aware that the lack of personal jurisdiction over defendant does not preclude a transfer of venue when it is placed in the wrong district court, or when placed in the proper district court it is changed for the convenience of the parties and in the interest of justice. Plaintiff claims in his papers in support of this motion that the convenience of all involved would be better served by transferring venue to the Southern District of New York. However, very little is said by plaintiff about the second and most important element in this test—whether it is in the interest of justice to do so. Defendant contends that the interest of justice would best be served by this court considering more than the mere extra expenses and loss of time which plaintiff claims would result from a denial of his motion.

Perhaps it is best to begin our analysis with a discussion of the purposes of change of venue statutes in general, and particularly, 28 U.S.C.A. Section 1404(a), the provision here at issue. That Section provides:

“(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.”

It is immediately apparent on reading the cases that a plaintiff's choice of venue enjoys a preferred position and will not normally be upset absent a showing of good cause. It is also clear, and understandably so, that it is usually a defendant and not plaintiff who invokes Section 1404(a). These transfer sections were primarily intended to give the defendant an opportunity to overcome an inconvenient or harassing choice of forum made by plaintiff. Although several courts have held that this section is unavailable to a plaintiff who has chosen the forum [See *Barnhart v. John B. Rogers Producing Co.*, 86 F. Supp. 595 (D.C.N.D. Ohio 1949); *Trader v. Pope & Talbert, Inc.*, 190 F. Supp. 282, 283 (D.C. E.D. Pa. 1961)], it seems, that there is other authority which holds that the provision is available to both parties because of its reference to “convenience to parties”. A plaintiff's reason must, however, be more compelling than that required of a defendant. The burden of proof is on the movant, plaintiff in this case, to demonstrate a strong need for such transfer. (*Levin v. Mississippi River Corporation*, 289 F. Supp. 353, 359-60 [S.D.N.Y. 1968].) These courts usually require some change in circumstances or conditions or some other just cause before permitting such a transfer at plaintiff's request. See, 1 *Moore, Federal Practice*, ¶0.145 [4.-2] at p. 1766 (2d ed. 1953). Of course, it is defendant's position that although this transfer might very well be for the convenience of the parties and the action could have originally been brought in the Southern District of

New York, the other factor—that it be in the interest of justice—is conspicuously lacking. Indeed it is clearly in the interest of justice that such request be denied and dismissal affirmed.

To grant plaintiff's request for transfer will not afford to defendant the full protection of the law it is entitled to expect. Justice requires, in the circumstances at bar, that the court refuse to condone plaintiff's tactics.

The decision on this motion cannot be made in a vacuum; it must take cognizance of all factors which could in any way bear on the determination of what is just in these unusual circumstances.

In determining whether a transfer to New York will be in furtherance of substantial justice, we must discuss the validity of plaintiff's delay, his present motives for the request, and the prejudice to the rights of defendant that such a transfer will effect. With so much at stake, it is not possible to treat this as just another motion for change of venue for the convenience of the parties. As earlier noted, this motion was made merely to avoid the inevitable sanction of plaintiff by this court for his lack of diligence in prosecuting this claim. Plaintiff mistakenly expects that a transfer and subsequent consolidation of this action with that recently dismissed in the Southern District of New York will establish a sufficient connection and continuity to overcome a Statute of Limitations defense. Defendant realizes that this will not be the result and contends further that the transfer with its inherent uncertainty is sufficiently prejudicial to its rights to warrant denial.

Since transfer would necessarily involve questions of due process, defendant finds it difficult to understand how a court could seriously entertain a motion of this nature or what is to be gained by permitting transfer. In dealing with a case of this type it is necessary that we include as

factors in our determination, the general purposes of a system of rules and procedures such as the Federal Rules of Civil Procedure and the local rules of the District of Columbia. It is clear that most of the rules are promulgated with the intent of expediting the adjudication of cases and controversies on the merits. (See, *Goldlawr, Inc. v. Heiman*, 369 U.S. 463 [1962].) Their purpose is to avoid dismissal before a consideration on the merits when "time-consuming and justice defeating technicalities" would produce such a result. No such technicalities are here present and no interest of justice requires transfer instead of dismissal. Quite the contrary, essential procedural rights and constitutional protections are at stake. In furtherance of this policy of diligent adjudication the law has adopted various rules and procedures of assuring an early and diligent adjudication of controversies.

Of particular significance here are the words of the Court in *Caribbean Const. Corp. v. Kennedy Van Saun Mfg. & Eng. Corp.*, 13 F.R.D. 124, 127 (S.D.N.Y. 1952):

"[T]he Federal Rules of Civil Procedure are to be viewed as an integrated whole and not as isolated fragments. The practice here indulged in, if permitted to go by unchecked, could become a convenient stratagem for plaintiffs, willing to adopt it, to defeat the purpose of the requirement of Rule 26(a), and, incidentally, to secure priority in the taking of depositions. Simply by failing to deliver papers to the Marshal until after the requisite twenty days had expired and then on the twenty-first day serving notice of deposition upon the defendants, plaintiffs, in practical terms, could vitiate the requirement of Rule 26(a) that leave of court be obtained within the twenty-day period following the commencement of suit."

What rights of defendant are now in jeopardy? The one most immediately in danger is defendant's right to

preclude the tolling of a statute of limitations for an indefinite period; especially when this is accomplished solely by the conduct of plaintiff.

In *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965) the Supreme Court explained the reasons behind the Statute of Limitations:

"Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.' *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-349. Moreover, the courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights."

This is precisely the problem in the case at bar. As a corollary to this policy of establishing Statutes of Limitations, the FRCP has taken steps to implement it. Usually, the filing of a lawsuit shows the proper diligence which the Statute of Limitations was intended to insure; but, this is not always the case. Consequently, other procedures and sanctions have been adopted to prevent abuse of this policy.

In 2 *Moore, Federal Practice*, § 4.05 at p. 974 (2d ed. 1953), it is stated that:

". . . the primary purpose of the provision imposing a duty upon the clerk to issue a summons immediately upon the filing of the complaint and to deliver it for service to an officer is to lessen the possibility of ques-

tions whether the mere filing of the complaint suspends the operation of an applicable statute of limitations or whether any further step is required, such as the issuance of the summons or the delivery of the summons and the complaint to an officer for service or the actual service of the summons and complaint. But Rule 4(a) is not limited to this purpose and it is relevant in the construction of all the Rules."

Rule 3 which provides that a suit is commenced upon the filing of the complaint in a district court must be read in conjunction with Rule 4(a) which commands issuance of a summons "forthwith" and service with due diligence.

"... Rule 4(a) is intended as a flexible and simple means for securing promptness in service of process after the complaint is filed. It aims, on the one hand, at eliminating the possible unfair advantage given by procedural systems in which issuance and service of process are entirely in plaintiff's control. On the other hand, it seeks to avoid the opposite extreme of setting an arbitrary time limit in which process must be served. . . . And the lack of a specific time limit in which process must be served sometimes opens the door to abuse." 2 *Moore, Federal Practice*, § 4.06-1 at p. 978 (2d ed. 1953).

The purpose of the rule is to prevent fraudulent and negligent tolling of the Statute of Limitations to a defendant's detriment.

The advisory committee had considered specifying a time limit for service of process, but had not done so anticipating that sufficient means were available under Rule 41(b) to attack unreasonable delay in the prosecution of an action after commencement. *Messenger v. United States*, 231 F. 2d 328, 329 (2d Cir. 1956). (This is the thrust of our present position.)

More important to our discussion is the *Messenger* court's statement that:

"The operative condition of the Rule is lack of due diligence on the part of the plaintiff—not a showing by the defendant that it will be prejudiced by denial of its motion (citing case). It may well be that the latter factor may be considered by the court, especially in cases of moderate or excusable neglect, in the formulation of its discretionary ruling."

Thus, the operable factor is unwarranted delay attributable to plaintiff—the exact fact situation at bar. In the instant case, both factors are present—lack of diligence by plaintiff and prejudice to defendant.

In *U.S. v. Spreckels*, 50 F. Supp. 789 (N.D. Cal. 1943), a delay of 4 years and 10 months was considered unreasonable. In *Elizabethtown Trust Co. v. Konschak*, 267 F. Supp. 46 (D.C.E.D. Pa. 1967), a motion to quash and motion to dismiss was granted when service was made more than five years after filing of the complaint. The court stated:

". . . [A] plaintiff must exercise due diligence to perfect service after the filing of the complaint and the question of due diligence is one for the court to decide on an ad hoc basis." (Citation omitted)
Id. at 48

The court added:

"It has been held that failure to perfect service until six months after the statute of limitations expired and nine months after the filing of the complaint constitutes a lack of due diligence. *Schram v. Holmes*, 4 F.R.D. 119 (D. Mich. 1943). In *Hoffman v. Wair*, 193 F. Supp. 727 (D. Ore. 1961) service two years after the filing of the complaint was held to be too late. And in *Richard-*

son v. United White Shipping Co., 38 F.R.D. 494 (N.D. Cal. 1965) it was held that service perfected 28 months after the filing of the action came too late." *Id.*

2 *Moore, Federal Practice*, concludes his chapter on Rule 4(a):

"In sum, it may be said that the flexibility of Rule 4(a) is meant to foster the early adjudication of claims, *not a device to evade that end.*" (Emphasis supplied) p. 984.

There is no need to further expound on the rights of defendant in the case at bar. Suffice it, that deprivation of these rights by any means, should not be tolerated. Moreover, defendant is also entitled to the benefit of this court's experience in dealing with violations of its local rules. In *Sheaffer v. Warehouse Employees Union, Local No. 730*, 408 F.2d 204 (D.C. Cir. 1969) the Court of Appeals stated:

"It is clear that the District Court has the 'inherent power' to dismiss a case for want of prosecution. [Cases cited.] This power exists independent of the authority of the Federal Rules of Civil Procedure (Rule 41(b)) or any local rules of court (Rule 13(a)). . . ."

The net result of a transfer will be that the Southern District of New York Court will have to make the determinations of jurisdiction and diligence for which this Court is particularly suited. It will have to interpret the "doing business" provisions of the District of Columbia to determine if in fact defendant was doing business at the time plaintiff claims. In addition, the New York Court would have to interpret whether the attachment procedures followed were proper according to the law of the District of Columbia and whether service was effectively made according to the Rules of Federal Procedure by serving notice of this attachment on defendant in New York. This would

require an analysis of the local District of Columbia rules on extra territorial service. It would have to determine on a motion by defendant whether in the circumstances the District of Columbia court abused their discretion by allowing the continued reinstatement of this action in the face of an apparent lack of diligence by plaintiff. Should this court consider transfer the most convenient, expeditious and equitable manner of determining the rights of the parties here involved, justice will have been subordinated to convenience with defendant as the only loser. There is also serious question whether an in rem action of this nature is subject to transfer under 28 U.S.C.A. section 1404(a). See 1 *Moore, Federal Practice*, § 6-4 at p. 1798 (2d ed. 1953).

In short, to deprive the defendant of its procedural right to be timely informed of a claim by withholding the procedural sanction is as much a violation of the right of due process under the Fourteenth Amendment as is a judgment rendered against it without the constitutional contacts and notice required by *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). Defendant was not constitutionally subject to suit in the District of Columbia nor did it receive constitutional notice during the period of the pendency of this action. To require defendant to proceed after this unconscionable delay would constitute serious prejudice to its position. Moreover, defendant should not be penalized for the obvious inadequacies of a system which permits a claim of this age to be prosecuted against a faultless defendant. It would seem that such a transfer would now be beyond the discretion of the Court.

Of course, defendant appreciates that there must be a desire in a case such as the present one to simply transfer such a troublesome matter. Unfortunately, convenience of the transferring court is not a valid consideration.

POINT II

The District Court was correct in granting defendant's motion to dismiss.

Judge Pratt properly dismissed this action with prejudice pursuant to Rule 41(b) FRCP on the following grounds:

1. plaintiff failed to comply with the October 20, 1969 Order of Judge Jones (A. 47) in that plaintiff did not effect personal service on defendant by December 31, 1969; and

2. that plaintiff had failed to prosecute this action with due diligence.

Judge Pratt in his Opinion rendered on May 14, 1970 stated the following:

"The Court: Since the filing of this case in August of 1955, the case has been dismissed and reinstated at least three, and possibly four, times; and there have been at least 25 unsuccessful attempts at personal service.

More than 14 years after the case was originally filed, and after it had been passed upon by at least six Judges of this Court, Judge Jones, on October 20, 1969, entered an order as the result of a calendar call stating:

'Ordered that if service on the defendant is not perfected by December 31, 1969, the cause shall be dismissed without prejudice by the Clerk on that date.'

Subsequent to that date, in January, the plaintiff filed an affidavit of one, William McAdams, in which Mr. McAdams states, in effect, that he was an employee of Foote, Cone & Belding, Inc. during 1954

and 1955, had offices at 711 Fourteenth Street during that period and that while he was so employed he was served with a summons and complaint in the above case by means of personal service; that he telephoned long distance to Robert Carney, President of Foote, Cone & Belding, and informed him that he had been so personally served and at the request of Robert Carney, he mailed the summons and complaint to the said Robert Carney.

Now, this affidavit of Mr. McAdams comes some 14 years after the alleged event.

In the second place, it was completely contra to the return of the summons, which was made by George D. Smithy, Deputy, in connection with an attempt to serve the summons in December, and the return reads:

'I hereby certify that I served the summons and complaint on the therein named Foote, Cone & Belding Corporation by handing to and leaving a true correct copy therewith with Mrs. William McAdams by authorization of plaintiff, personally, at 4545 Connecticut Avenue, Apartment 806, at 8:15 p.m. on the 8th of December 1955.'

The original of the summons indicates that the summons should be served on William D. McAdams; and as I said just previously, the return indicates that it was made on Mrs. William McAdams by authorization of the plaintiff.

In addition, there is in the record an affidavit of a Mr. Balian, a vice-president of the defendant, to the effect that McAdams was not an employee of the company at the time the alleged service was attempted; that it had no office in the District of Columbia at that time et cetera.

Since the question of whether or not service was made is a mixed question of law and fact for this Court to determine I think by the overwhelming pre-

ponderance of the evidence, taking into account that some 14 years have elapsed, that personal service was not made and has not yet been made on the defendant by the plaintiff.

Since personal service has not been made up to the present time, it was not made on or before December 31, 1969, the period specified in Judge Jones' order.

In the meantime, there were various motions, to change venue, plaintiff's motion for default judgment, plaintiff's motion for further consideration of court order granting additional time to respond, defendant's motion to dismiss pursuant to Judge Jones' order of October 20th, and the defendant's motion for dismissal pursuant to the Federal Rules of Civil Procedure, 41(b), for failure to prosecute.

I am going to dismiss this action on two grounds:

One, the failure to comply with Judge Jones' order of October 20, 1969; and

Two, because of the provisions of Rule 41(b), which provides, in part:

'For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.'

Mr. Moore, in his volume on Federal Practice, Volume 2, at page 931, states, in pertinent part:

'However, where there is unwarranted delay attributable to the plaintiff in the issuance of the summons, its delivery to the marshal or person specially appointed to make service, or in the service of process, the action is subject to a motion to dismiss under Rule 41(b) in the discretion of the court for failure to prosecute.'

The power of the Court to dismiss under that rule and the inherent power of the Court to dismiss an

action under circumstances such as these has been recently spelled out by our Court of Appeals in the Sheaffer case, reported at 408 F.2d.

For all of the foregoing reasons, I am going to grant the defendant's motion to dismiss, and I am going to require defense counsel to prepare the order with the necessary recitals."

This ruling by Judge Pratt is amply supported by the record. Despite the January 14, 1970 affidavit of William McAdams (A. 38) which claimed that defendant maintained an office in Washington, D. C. "in 1954 and 1955", that McAdams was employed by defendant during that period of time and that McAdams was personally served with a summons and complaint in this case, and photostat of an entry of the September 1954 Washington Metropolitan Telephone Directory (A. 7) which shows a listing for defendant at 711 14th Street N.W., these allegations are completely refuted by the February 13, 1970 affidavit of Richard Balian (appendix A to this brief), Vice President, Administration of defendant and the February 13, 1970 affidavit of Philip Clark Kattenburg (appendix B to this brief) indicating that defendant had removed its Washington, D. C. listing between September, 1954 and June, 1955.

Mr. Balian's affidavit states in pertinent part:

"a. William McAdams was first hired by defendant on January 1, 1954 as Washington, D. C. public relations representative to service one of defendant's advertising clients, to wit: Watchmakers of Switzerland Information Center, Inc.

"b. On January 5, 1954 defendant leased office space at 711 14th Street, N. W., Washington, D. C. from Raymond L. Smith, for a period of one year with the right to renew for an additional one year period.

"c. On May 17, 1954 Mr. McAdams' employment by defendant was terminated but defendant continued to pay Mr. McAdams until September 17, 1954.

"d. Upon the termination of Mr. McAdams' employment by defendant on May 17, 1954, defendant informed Mr. McAdams that he could continue to utilize the premises at 711 14th Street N.W., Washington, D. C. at Mr. McAdams own expense.

"e. Defendant never exercised its option to rent the aforesaid premises at 711 14th Street N. W., Washington, D. C. after January 4, 1955.

"Since May 17, 1954 defendant has never had any of its officers, agents or employees permanently or temporarily based in Washington, D. C. and that since January 4, 1955 defendant has never had any use, possession, obligation or any other connection with any office space in Washington, D. C."

Not only was defendant *not amenable* to service on December 8, 1955 when the summons and complaint was purportedly served on it, but the United States Marshal's return of service indicates that service was in effect made on "Mrs. William McAdams by authorization of plaintiff personally at 4545 Connecticut Avenue, Apt. 806 * * * on the 8th day of December 1955" (S.A. 1). In fact, to this date plaintiff has never obtained personal jurisdiction over defendant in this jurisdiction. Dismissal was proper for any or all of the following reasons:

1. Failure to comply with the October 20, 1969 Order of Judge Jones (S.A. 12) in that plaintiff has still not personally served defendant in this action.

2. Failure to comply with Local Rule 13, Dismissal for Failure to Prosecute, wherein Par. (e) states: "A case shall not be reinstated more than once. . . ." This case has been reinstated four (4) times and if Judge Pratt's Order of dismissal is reversed will be, in effect, reinstated five (5) times over a period of approximately sixteen (16) years.

3. Rule 41(b) of the Federal Rules of Civil Procedure provides in pertinent part: "For failure of the Plaintiff to prosecute or to comply with these Rules or any Order of Court, a Defendant may move for dismissal of an action. . . ." Unless the Court in its Order for Dismissal otherwise specifies, a Dismissal under this subdivision and any Dismissal not provided for in this Rule, other than a Dismissal for Lack of Jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." The Plaintiff herein has failed to prosecute in this Court or any other Court where he might have acquired service of process on the Defendant for a period of more than fourteen and a half (14½) years.

4. This Court has "inherent power" to dismiss this case for want of prosecution. "It is clear that the District Court has the 'inherent power' to dismiss a case for want of prosecution. [Cases cited.] This power exists independent of the authority of the Federal Rules of Civil Procedure (Rule 41(b)) or any local rules of court (rule 13(a)). . . ." *Sheaffer v. Warehouse Employees Union, Local No. 730, supra.*

Defendant respectfully submits that the following language in *Delta Theatres, Inc. v. Paramount Pictures, Inc.*, 398 F. 2d 323 (5th Cir. 1968) is most appropriate: ". . . no action had been taken by plaintiff in this cause since December 23, 1959 and that since transactions were involved in this case dating from 1947, the defendants have been prejudiced by plaintiff's lack of diligence. It would be an intolerable situation which would not permit a dismissal with prejudice in circumstances such as those present in this case. Approximately fourteen years after suit was filed, with no action taken for about seven years, plaintiff cannot be heard to complain that his case has now been dismissed with prejudice. It is surprising that such

action was not taken by the district court sua sponte, long before defendants filed their motion. [Cases cited.] No plaintiff should be permitted to sleep on his rights and harass a defendant with such unreasonable delay."

Quite clearly, defendant herein has been prejudiced by plaintiff's lack of diligence. Defendant cannot be required to round up witnesses and documents of some sixteen (16) to twenty-three (23) years ago to defend itself against plaintiff's sixteen-year-old lawsuit, nor should defendant be continuously subjected to plaintiff's harassment and the resulting time, energy and expense involved in defending itself from same.

Plaintiff cannot be heard to complain. At any time during the last sixteen (16) years, he could have brought a suit against defendant where defendant could properly have been served, namely, New York City. Plaintiff chose not to do so.

Surely, Judge Pratt acted entirely within his discretion and was fully supported by the record in dismissing this case with prejudice, pursuant to the authority of Rule 41(b) or the court's own inherent power, so recently confirmed by this Court of Appeals in *Sheaffer v. Warehouse Employees Union, Local No. 730, supra*.

Despite all of plaintiff's protestations that he continually sought to bring this action in the District of Columbia because he believed that the late Judge Holtzoff was *sympathetic* to plaintiff's position, the fact remains that Judge Holtzoff dismissed the identical complaint on the merits, *Curtis v. Time, Inc.*, 147 F.Supp 505 (USDC, DC 1957—Appendix C to this brief) and Judge Holtzoff's dismissal was affirmed *per curiam* by the United States Court of Appeals, District of Columbia Circuit, 251 F.2d 389 (1958—Appendix D to this brief).

The purport of Judge Holtzoff's Opinion is that plaintiff had no property right in the *idea* of publishing pictures

and narratives of lives of Congressional Medal of Honor winners, the idea was not novel and the publication of such pictures and narratives in advertisements for United States Savings Bonds was not appropriated or even borrowed from plaintiff. It is interesting to note that the affirmance by this court took into consideration the very submission to the advertising agency plaintiff is attempting to sue upon herein.

We believe that plaintiff has had his day in court with the identical subject matter of his complaint herein having been dismissed on the merits.

POINT III

Both Judge Pratt and Chief Judge Curran were entirely correct in denying plaintiff's various motions for reconsideration, to remove Judge Pratt from this matter and to overrule Judge Pratt.

This portion of plaintiff's appeal does not even merit refutation. This Court is respectfully referred to both plaintiff's "Motion for Rehearing" (S.A. 24-25k) and plaintiff's "Motion to Remove Judge Pratt from this Case because of Bias and for Other Reasons, etc." (A. 11-16). There is not one shred of evidence to support any contention that this case was not properly before Judge Pratt and that Judge Pratt acted in any way improperly.

CONCLUSION

For the foregoing reasons it is respectfully submitted that all of the Opinions of Judge Pratt and Judge Curran appealed from by plaintiff be affirmed in all respects, and that at long last plaintiff's suit remain dismissed for all time.

November 12, 1971.

Respectfully submitted,

MILG G. COERPER,
COUDERT BROTHERS,
One Farragut Square South,
Washington D.C. 20006,
Attorneys for Appellee.

EUGENE L. GIRDEN,
TIMOTHY K. HART,
COUDERT BROTHERS,
200 Park Avenue,
New York, New York 10017,
Of Counsel.

Certificate of Service

I Hereby Certify that two copies of the foregoing Brief of Appellee were mailed on the 11th day of November, 1971 to Arthur S. Curtis, Appellant pro se, 816 National Press Building, Washington, D. C.

EUGENE L. GIRDEN,
Of Counsel.

APPENDIX A

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

RICHARD BALIAN, being duly sworn, deposes and says:

1. I am Vice President, Administration of defendant in the above entitled action and make this affidavit in support of defendant's motion to dismiss.

2. As Vice President, Administration, the payroll and other financial records are kept and maintained as permanent records of defendant under my general supervision, and I have searched the payroll and other financial records of defendant for the calendar years 1954 and 1955 and have ascertained the following facts:

a. William McAdams was first hired by defendant on January 1, 1954 as Washington, D. C. public relations representative to service one of defendant's advertising clients, to wit: Watchmakers of Switzerland Information Center, Inc.

b. On January 5, 1954 defendant leased office space at 711 14th Street N.W., Washington, D. C. from Raymond L. Smith, for a period of one year with the right to renew for an additional one year period.

c. On May 17, 1954 Mr. McAdams' employment by defendant was terminated but defendant continued to pay Mr. McAdams until September 17, 1954.

d. Upon the termination of Mr. McAdams' employment by defendant on May 17, 1954, defendant informed Mr. McAdams that he could continue to utilize the premises at 711 14th Street N.W., Washington, D. C. at Mr. McAdams own expense.

e. Defendant never exercised its option to rent the aforesaid premises at 711 14th Street N.W., Washington, D. C. after January 4, 1955.

3. Since May 17, 1954 defendant has never had any of its officers, agents or employees permanently or temporarily based in Washington, D. C. and that since January 4, 1955 defendant has never had any use, possession, obligation or any other connection with any office space in Washington, D. C.

s/s RICHARD G. BALIAN.
RICHARD G. BALIAN.

Sworn to before me this
13th day of February, 1970.

JOAN WEISS,
Notary Public,
State of New York.
No. 41-4207255.
Qualified in Queens County.
Certificate filed in New York County.
Commission Expires March 30, 1971.

APPENDIX B**Affidavit of Philip Clark Kattenburg.**

The undersigned, Philip Clark Kattenburg, being first duly sworn, deposes and says:

1. I am a law clerk in the Washington Office of the law firm of Coudert Brothers at One Farragut Square South, Washington, D. C. 20006.

2. On the request of a resident partner of that law firm, namely, Milo G. Coerper, Esq., I called the Business Office of the Chesapeake and Potomac Telephone Company on or about Monday, February 2, 1970, and asked them to send me a certified copy of the cover page of the Washington Metropolitan Area Telephone Directory issued in 1955, which I understand was issued in June, along with a copy of the page which would show a telephone number for Foote, Cone & Belding, Inc., if there were such a listing in the phone book. I was informed by the said business office that there was no such listing for Foote, Cone & Belding, Inc. and subsequently I received from them copies of the said cover page and the page which would include such a listing if it existed. Said cover page and other page which would show such a listing are attached hereto.

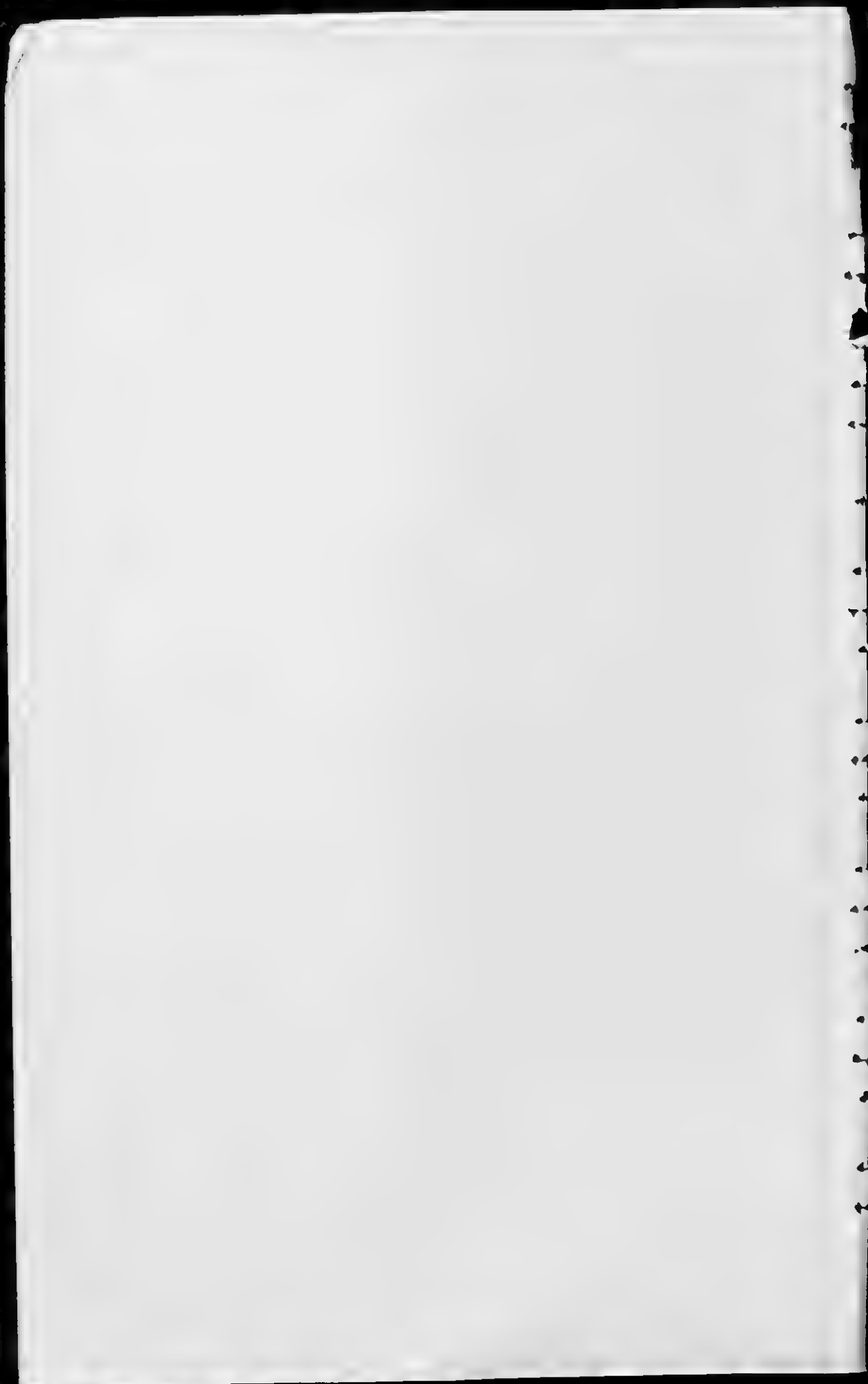
s/ PHILIP CLARK KATTENBURG.
PHILIP CLARK KATTENBURG.

Subscribed and sworn to before me this
13th day of February, 1970.

s/ CHARLOTTE A. WHITTINGTON,
Notary Public.
My Commission Expires Oct. 14, 1972.

Exhibits, Annexed to Foregoing Affidavit.

(See opposite 13)



WASHINGTON METROPOLITAN AREA TELEPHONE DIRECTORY

JUNE 1953



Be careful to keep in touch



USE

EDWARDS JONES

SEE INDEX FOR
FOR EACH NAME

ALSO SEE
INDEX

SEE INDEX

ALSO SEE INDEX, FOR
THE 1954 EDITION

[illegible]

Foster, J. T. 1931-1932, 1933-1934, 1935-1936, 1937-1938, 1939-1940, 1941-1942, 1943-1944, 1945-1946, 1947-1948, 1949-1950, 1951-1952, 1953-1954, 1955-1956, 1957-1958, 1959-1960, 1961-1962, 1963-1964, 1965-1966, 1967-1968, 1969-1970, 1971-1972, 1973-1974, 1975-1976, 1977-1978, 1979-1980, 1981-1982, 1983-1984, 1985-1986, 1987-1988, 1989-1990, 1991-1992, 1993-1994, 1995-1996, 1997-1998, 1999-2000, 2001-2002, 2003-2004, 2005-2006, 2007-2008, 2009-2010, 2011-2012, 2013-2014, 2015-2016, 2017-2018, 2019-2020, 2021-2022, 2023-2024, 2025-2026, 2027-2028, 2029-2030, 2031-2032, 2033-2034, 2035-2036, 2037-2038, 2039-2040, 2041-2042, 2043-2044, 2045-2046, 2047-2048, 2049-2050, 2051-2052, 2053-2054, 2055-2056, 2057-2058, 2059-2060, 2061-2062, 2063-2064, 2065-2066, 2067-2068, 2069-2070, 2071-2072, 2073-2074, 2075-2076, 2077-2078, 2079-2080, 2081-2082, 2083-2084, 2085-2086, 2087-2088, 2089-2090, 2091-2092, 2093-2094, 2095-2096, 2097-2098, 2099-2100, 2101-2102, 2103-2104, 2105-2106, 2107-2108, 2109-2110, 2111-2112, 2113-2114, 2115-2116, 2117-2118, 2119-2120, 2121-2122, 2123-2124, 2125-2126, 2127-2128, 2129-2130, 2131-2132, 2133-2134, 2135-2136, 2137-2138, 2139-2140, 2141-2142, 2143-2144, 2145-2146, 2147-2148, 2149-2150, 2151-2152, 2153-2154, 2155-2156, 2157-2158, 2159-2160, 2161-2162, 2163-2164, 2165-2166, 2167-2168, 2169-2170, 2171-2172, 2173-2174, 2175-2176, 2177-2178, 2179-2180, 2181-2182, 2183-2184, 2185-2186, 2187-2188, 2189-2190, 2191-2192, 2193-2194, 2195-2196, 2197-2198, 2199-2200, 2201-2202, 2203-2204, 2205-2206, 2207-2208, 2209-2210, 2211-2212, 2213-2214, 2215-2216, 2217-2218, 2219-2220, 2221-2222, 2223-2224, 2225-2226, 2227-2228, 2229-2230, 2231-2232, 2233-2234, 2235-2236, 2237-2238, 2239-2240, 2241-2242, 2243-2244, 2245-2246, 2247-2248, 2249-2250, 2251-2252, 2253-2254, 2255-2256, 2257-2258, 2259-2260, 2261-2262, 2263-2264, 2265-2266, 2267-2268, 2269-2270, 2271-2272, 2273-2274, 2275-2276, 2277-2278, 2279-2280, 2281-2282, 2283-2284, 2285-2286, 2287-2288, 2289-2290, 2291-2292, 2293-2294, 2295-2296, 2297-2298, 2299-2300, 2301-2302, 2303-2304, 2305-2306, 2307-2308, 2309-2310, 2311-2312, 2313-2314, 2315-2316, 2317-2318, 2319-2320, 2321-2322, 2323-2324, 2325-2326, 2327-2328, 2329-2330, 2331-2332, 2333-2334, 2335-2336, 2337-2338, 2339-2340, 2341-2342, 2343-2344, 2345-2346, 2347-2348, 2349-2350, 2351-2352, 2353-2354, 2355-2356, 2357-2358, 2359-2360, 2361-2362, 2363-2364, 2365-2366, 2367-2368, 2369-2370, 2371-2372, 2373-2374, 2375-2376, 2377-2378, 2379-2380, 2381-2382, 2383-2384, 2385-2386, 2387-2388, 2389-2390, 2391-2392, 2393-2394, 2395-2396, 2397-2398, 2399-2400, 2401-2402, 2403-2404, 2405-2406, 2407-2408, 2409-2410, 2411-2412, 2413-2414, 2415-2416, 2417-2418, 2419-2420, 2421-2422, 2423-2424, 2425-2426, 2427-2428, 2429-2430, 2431-2432, 2433-2434, 2435-2436, 2437-2438, 2439-2440, 2441-2442, 2443-2444, 2445-2446, 2447-2448, 2449-2450, 2451-2452, 2453-2454, 2455-2456, 2457-2458, 2459-2460, 2461-2462, 2463-2464, 2465-2466, 2467-2468, 2469-2470, 2471-2472, 2473-2474, 2475-2476, 2477-2478, 2479-2480, 2481-2482, 2483-2484, 2485-2486, 2487-2488, 2489-2490, 2491-2492, 2493-2494, 2495-2496, 2497-2498, 2499-2500, 2501-2502, 2503-2504, 2505-2506, 2507-2508, 2509-2510, 2511-2512, 2513-2514, 2515-2516, 2517-2518, 2519-2520, 2521-2522, 2523-2524, 2525-2526, 2527-2528, 2529-2530, 2531-2532, 2533-2534, 2535-2536, 2537-2538, 2539-2540, 2541-2542, 2543-2544, 2545-2546, 2547-2548, 2549-2550, 2551-2552, 2553-2554, 2555-2556, 2557-2558, 2559-2560, 2561-2562, 2563-2564, 2565-2566, 2567-2568, 2569-2570, 2571-2572, 2573-2574, 2575-2576, 2577-2578, 2579-2580, 2581-2582, 2583-2584, 2585-2586, 2587-2588, 2589-2590, 2591-2592, 2593-2594, 2595-2596, 2597-2598, 2599-2600, 2601-2602, 2603-2604, 2605-2606, 2607-2608, 2609-2610, 2611-2612, 2613-2614, 2615-2616, 2617-2618, 2619-2620, 2621-2622, 2623-2624, 2625-2626, 2627-2628, 2629-2630, 2631-2632, 2633-2634, 2635-2636, 2637-2638, 2639-2640, 2641-2642, 2643-2644, 2645-2646, 2647-2648, 2649-2650, 2651-2652, 2653-2654, 2655-2656, 2657-2658, 2659-2660, 2661-2662, 2663-2664, 2665-2666, 2667-2668, 2669-2670, 2671-2672, 2673

APPENDIX C

CURTIS v. TIME, INC.
Cite as 147 F. Supp. 505

ARTHUR S. CURTIS,

Plaintiff,

v.

TIME INC.,

Defendant.

Civ. A. 4959-54.

United States District Court
District of Columbia.
Jan. 25, 1957.

Action to recover damages for defendant magazine publisher's alleged misappropriation of an idea of plaintiff and unfair competition. The District Court, Holtzoff, J., held that defendant's publication of pictures and narratives of lives of Congressional Medal of Honor winners in advertisements of United States savings bonds did not constitute misappropriations of plaintiff's idea embodied in cartoon strips setting forth episodes in such winners' careers by illustration and narrative, as there is no property right in general idea of depicting such winners' lives.

Complaint dismissed on merits.

1. Literary Property 2

No one has a property right in historical or biographical event, but any one may publish biographies or photographs of Congressional Medal of Honor winners, United States Presidents, Senators and Congressmen, or other public officials or figures, and narratives of historical events.

2. Copyrights 4
Literary Property 2

A person can acquire a property right in a specific embodiment of an idea, and such an embodiment in literary or pictorial form may be protected under copyright law.

3. Literary Property 2

A magazine publisher's publication of pictures and narratives of lives of Congressional Medal of Honor winners in advertisements of United States savings bonds did not constitute misappropriation of an individual's idea embodied in cartoon strips setting forth episodes in such winners' careers by illustration and narrative, as there is no property right in general idea of depicting such winners' lives and such publisher having previously published photographs of and narratives relating to them, idea was not novel or borrowed from such individual.

Carl L. Shipley, Washington, D. C., for plaintiff.

John H. Pickering, Washington, D. C., and Harold R. Medina, Jr., New York City, for defendant.

Holtzoff, District Judge.

This is a trial of an action by the Court without a jury to recover damages claimed to have been sustained by an alleged misappropriation of an idea and by unfair competition.

The plaintiff is the creator and owner of what is commonly known as a comic strip or cartoon strip, called "The Medal of Honor". This strip sets forth specific episodes in the careers of winners of the Congressional Medal of Honor, which is done both by illustration and narrative. The plaintiff has embodied his idea in other forms as well. Subsequently the defendant, which is the publisher of a

magazine known as Time, published certain advertisements urging the purchase of United States Savings Bonds. These advertisements were illustrated by photographs of various winners of the Congressional Medal of Honor and by narratives describing episodes out of their lives. The plaintiff claims the publication of these advertisements constitute a misappropriation of his idea as well as unfair competition.

[1-3] No one has a right of property in a historical or biographical event. Any one may publish biographies or photographs of winners of the Congressional Medal of Honor, of Presidents of the United States, of Senators, Congressmen, or other public officials, or other public figures. Any one may publish narratives of historical events. For instance, in the past two or three years we have had a number of histories of the Civil War. No one can have a monopoly on the idea of publishing a history of particular wars or of any other events. A person can acquire, however, a property right in a specific embodiment of an idea, and if the embodiment is in a literary or pictorial form that embodiment may be protected under the copyright law. For example, a half a dozen people may write a history of the Civil War, but none has a right to complain of the other five, unless his specific embodiment of the history is copied by the others. So here the mere fact that the defendant published pictures and narratives of the lives of Congressional Medal of Honor winners does not constitute a misappropriation of the plaintiff's idea because there is no property right in the general idea of depicting the lives of these heroes. Plaintiff does not claim any infringement of copyright of the specific embodiment of his idea.

Moreover, it appears that the defendant had previously published photographs and narratives relating to winners of the Congressional Medal of Honor. Consequently, the idea of the plaintiff in its general and broad scope is not novel, although his specific embodiment may be.

This case is distinguishable from the case of *Belt v. Hamilton National Bank*, D.C., 108 F.Supp. 689, affirmed 93 U.S. App.D.C. 168, 210 F.2d 706. In the latter case, there was a concrete novel idea of a narrow scope, instead of an abstraction. In fact, in its opinion in that case, the Court observed that for "such a concept, however, in order to receive the protection of the law must be more than a mere abstraction. It must be reduced to a concrete detailed form. It must, of course, be novel."

In addition, in the *Belt* case, the defendant had been negotiating with the plaintiff for the use of his idea and then dropped the negotiations and used this very idea but repudiated any obligation to pay the plaintiff. No such situation confronts us in this case. Here the advertisements related to the sale of Government bonds. Moreover, as heretofore indicated, since the defendant had previously used the idea of publicizing in one way or another the lives of winners of the Congressional Medal of Honor, it cannot be said that the idea of these advertisements was borrowed from the plaintiff.

For all these reasons, the plaintiff is not entitled to recover, and accordingly the complaint will be dismissed on the merits.

Counsel may submit proposed findings of fact and conclusions of law.

APPENDIX D

CURTIS v. TIME, INC.

Cite as 251 F.2d 389

ARTHUR S. CURTIS, t/a A. S. Curtis Features Syndicate,
Appellant,

v.

TIME, INC.,

Appellee.

No. 13870.

United States Court of Appeals
District of Columbia Circuit.

Argued Dec. 13, 1957.

Decided Jan. 16, 1958.

Owner of copyrighted, syndicated cartoon series, which was entitled "Medal of Honor," which appeared in newspapers after World War II, and which depicted heroic deeds of winners of the Congressional Medal of Honor, brought action for damages against magazine publisher, which ran a series of defense bond advertisements, sponsored by the United States Government, and entitled "Medal of Honor," and bearing some resemblance to cartoon series, on ground that magazine publisher appropriated property of owner of cartoon series. The United States District Court for the District of Columbia, Alexander Holtzoff, J., 147 F.Supp. 505, entered judgment of dismissal on the merits, and the owner of the cartoon series appealed. The Court of Appeals held that there was no error which would warrant disturbing the action of the District Court.

Judgment affirmed.

Owner of copyrighted, syndicated cartoon series, which was entitled "Medal of Honor," which appeared in news-

papers after World War II, and which depicted heroic deeds of winners of Congressional Medal of Honor, was not entitled to recover damages from magazine publisher, which ran a series of defense bond advertisements sponsored by the United States Government, and entitled "Medal of Honor," and bearing some resemblance to cartoon series, on ground that magazine publisher appropriated property of owner of cartoon series.

Mr. Arthur S. Curtis, appellant, pro se.

Mr. Harold R. Medina, Jr., New York City, of the bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Mr. John H. Pickering, Washington, D. C., was on the brief, for appellee.

Before WASHINGTON, DANAHY and BURGER, Circuit Judges.

PER CURIAM.

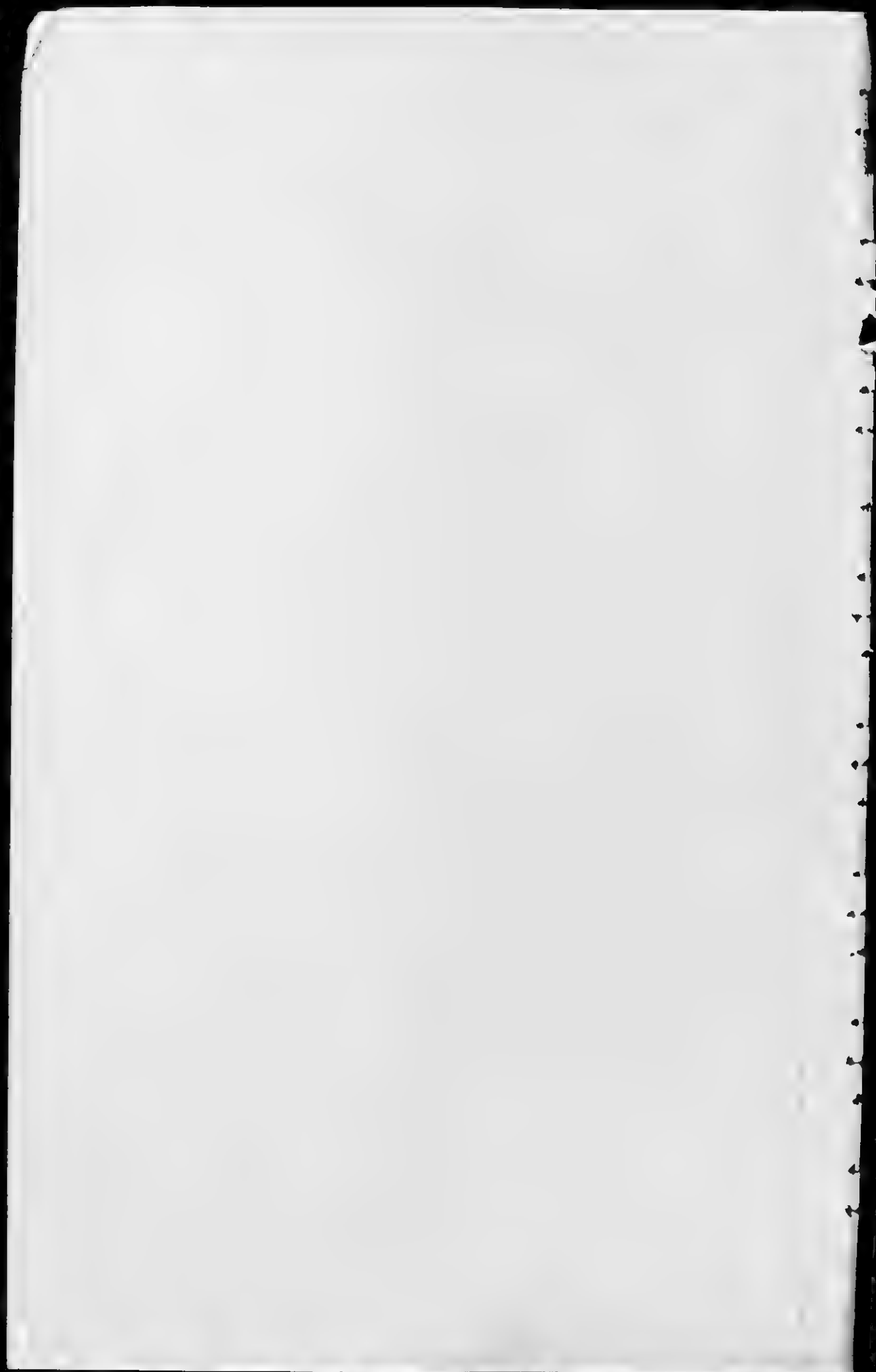
Curtis was the owner of a copyrighted, syndicated cartoon series entitled "Medal of Honor," which appeared in newspapers after World War II, and depicted the heroic deeds of winners of the Congressional Medal of Honor. During the Korean War, Time, Inc., publisher of Time magazine, ran a series of defense bond advertisements, sponsored by the United States Government, also entitled "Medal of Honor," which bore some resemblance to Curtis' series.¹ Curtis claimed Time, Inc. appropriated his

¹ Curtis' series each consisted of a strip of ten boxes, each box containing cartoons with narrative captions. The defense bond series each consisted of a single large block of text, with a portrait of the hero, and sometimes a single small cartoon illustration. As we have said, both series had the same title. Both bore a small illustration of the medal. Curtis' series dealt with World War II heroes, while the defense bond series dealt with Korean war heroes.

property, and his proof was (1) the similarity between the two series, and (2) the fact that Curtis had, prior to the Korean War, unsuccessfully attempted to sell his "Medal of Honor" series to Time, Inc., and also to the advertising agency which later prepared the defense bond series.

The trial court dismissed on the merits. We find no error which would warrant disturbing the action of the District Court.

Affirmed.



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CLERK OF THE UNITED
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APPELLANT'S REPLY BRIEF

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,572

ARTHUR S. CURTIS,

Appellant,

v.

FOOTE, CONE AND BELDING,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 13 1971

Nathan J. Paulson
CLERK

Arthur S. Curtis

816 National Press Building
Washington, D.C. 20004

Attorney for Appellants

APPELLANT'S REPLY BRIEF

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THE COURT SHOULD HAVE ADOPTED LESS DRASTIC
REMEDIES THAN DISMISSAL WITH PREJUDICE

In *Industrial Bldg. Materials, Inc. v Interchemical Corp.*, 437 F 2d 1336 (1970),

the Circuit Court said:

" In reviewing the propriety of dismissal under Rule 41 (b) we should, we think, look to see whether the court might have first adopted other, less drastic alternatives. *Flaska v. Little River Construction Co., Inc.*, 389 F 2d 885 (5th Cir. 1968); *Gill v. Stollow*, 240 F2d 669 (2d Cir. 1957)..the court's exercise of its discretion is reviewable, but it would certainly not be so vulnerable to challenge were it not for the question of whether suitable alternatives to dismissal were available.

" Unfortunately, in undertaking to ascertain whether the court considered other aids to the enforcement of its orders, we derive little guidance from the District Court opinion. It would appear from the opinion that no other sanctions were considered, but the opinion, reported at 278 F. Supp. 938, was written by the attorneys for the defendants.

"...This practice has been condemned because of the possibility that such findings and conclusions, prepared by the non-objective advocate, may not fully and accurately reflect the thoughts entertained by the impartial judge at the time of his initial decision."

The record shows that Judge Waddy, when he heard the case, considered the alternatives, and held that rather than dismiss, he would send the case to the New York U.S. District Court and let the Court there decide all matters. The transcript of hearing before Judge Pratt shows that he recognized that he had authority to send the case to New York but did not even consider alternatives to dismissal for prejudice, instead, stating that he came to the case with "attitudes", based upon the age of the case and the fact that it had passed thru many hands of judges:

"The Court: I still think it's a travesty on this Court.

I think all you've got to do is to read the docket entries, read the file accompanying them.

About eight Judges had a piece of this, and some of them had more than one piece. Some of them had several bites. This case has kicked around for fifteen years,

" Mr. Curtis. " (At Transcript, p. 28 of hearing.)

The Court, in fact, failed to consider the effect in the New York case of a dismissal under 41 in the District of Columbia, as is shown by the following: (transcript, p 14):

The Court: Aren't the cases duplicates of one another?

Mr. Curtis: Yes, duplicates of one another.

The Court: The only reason you want to shift this to New York is because the issue of the Statute of Limitations is arising in that court?

Mr. Curtis: I wouldn't say that, Your Honor.

The Court: Why don't you pursue your case in New York and abide by the results of that case.?"

The papers already before this Court show that the New York Court dismissed the case there based upon the ruling of Judge Pratt dismissing under 41(b) for failure to prosecute. Therefore, he failed to consider the alternatives in a realistic way, in which case, had he done so, he would or should have sent the case to New York, as Judge Waddy stated that he would do.

In *Brown v Thompson*, 430 Fed. 2d 1214 (1970), the Circuit Court quotes from the ruling case of *Flaska v Little River Marine Construction Co.*, 5th Cir. 1868, 389 F.2d 885, 887-888, cert. den. 392 U.S. 928, 88 S. Ct. 2287, 20 L.Ed 2d 1387, as follows:

"Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations, as the court has a wide range of lesser sanctions."

In the interest of justice, and the historic right of a trial on the merits, the ruling below should be reversed.

THE AUTHORITY CITED BY APPELLEE HARDLY SPEAKS WITH AUTHORITY

Appellee has a duty, in bringing cases to the Court, to bring something which will aid the Court in deciding the case according to the law.

Therefore, where is the authority of *Burnett v N.Y. Central*, cited on page 16 of the reply brief, which argues that the case is too old and should be thrown out, when the very paragraph which follows that one which is quoted, reads:

"This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights."

The case goes on to reverse a District Court and an Appellate Court which dismissed a suit because it was filed in U.S. District Court after the expiration of the three year statutory period, and to remand the case for trial.

Similarly, the *Sheaffer* case, argued by appellee, and upon which the trial judge appears to have relied, is different in every way in the facts from this case. In *Sheaffer*, the plaintiff violated numerous local rules and pretrial orders, was continuously tardy in filing papers, and showed a lack of diligence in complying with local rule 13 (a) - quite a different showing from that of the appellant here, with his almost thirty attempted services, attachments before judgment, and so forth. To cite the *Sheaffer* case for the authority that the court has inherent power to dismiss a case for want of prosecution is one thing - but to use it as authority in instant case is quite another. Authority to make a final decision must rest somewhere in every community, and in the centuries of history of our jurisprudence it has moved from the divine right of kings to the rule of parliaments to the rulings of courts. The community has entrusted in its appellate tribunals the power to see that the property right which lies in a suit is not without right taken without a trial on the merits.

The authorities cited by appellee have not persuaded appellant and will not, it is hoped, persuade the Court.

THE TIME, INC. CASE IS NOT PRECEDENT

In an apparent attempt to go into the merits in a case which has had only a procedural disposition, appellee cites the ruling in Time, Inc.

That case is not precedent for this case.

For one thing, the parties are different.

Secondly, the claims against Time were different than against Foote, Cone.

Thirdly, the evidence was different from what will be presented in this case.

Fourthly, Time, Inc. claimed a defense of prior use, which the court recognized, perhaps because Time was helping out the U.S. in a bond campaign not of its own creation. Foote, Cone and Belding has no defense of prior use, and in fact has waived that defense in its letter to appellant signed by its Vice President, Bertchold, dated 1946.

Finally, here is an entirely different case, with a different party, and evidence not usable in Time, Inc. Here, the evidence will show that in his Navy days, appellant was a war bond salesman; that after leaving the Navy, he developed a Medal of Honor series; that he came to Foote, Cone and Belding with the specific idea of producing a war bond Medal of Honor series which would be distributed to publications as he was then distributing his series, in matrice and repro form; and that this is exactly what Foote, Cone and Belding did, as will be proved by the Annual Reports of the Advertising Council. Finally, the proofs will show that it was agreed that payment would be made if use was made, and that no payment was made though it was made. Kern v. Hettinger, C.A. N.Y. 1959, 172 F.2d 333 IS AUTHORITY THAT Time, Inc. is not binding on this court in instant case.

THE DELAY IN COMING TO TRIAL DOES NOT
NECESSARILY WORK TO THE PREJUDICE OF APPELLEE

The chief argument of appellee is that delay in achieving service upon said appellee is detrimental to the interests of that party. Upon this rock, the trial judge appeared to have rested his opinion. But an examination of the facts show that the rock is made of paper hanging in thin air.

The papers in the case show that appellee has been on notice of the suit since 1955 when the case was filed, see affidavit of Wm. McAdams; see letters in the file between appellant and appellee and its lawyers.

Thus the facts show that the appellee in fact had more time to prepare its case than ordinarily, could have gotten written statements from its witnesses, and so forth - if, in truth, it had a defense to the action. It could also have entered an appearance at any time in the District of Columbia and flushed out the case with its defense - if it had one. The fact that it did nothing but close its office and avoid service, tells a tale in itself as to the strength of the defense.

In considering a similar point, the United States District Court, C.D. California, said (March 2, 1970) in *Hurst Concrete Products, Inc. v American Pipe and Construction Co.*, 50 Federal Rules Decisions at p. 89:

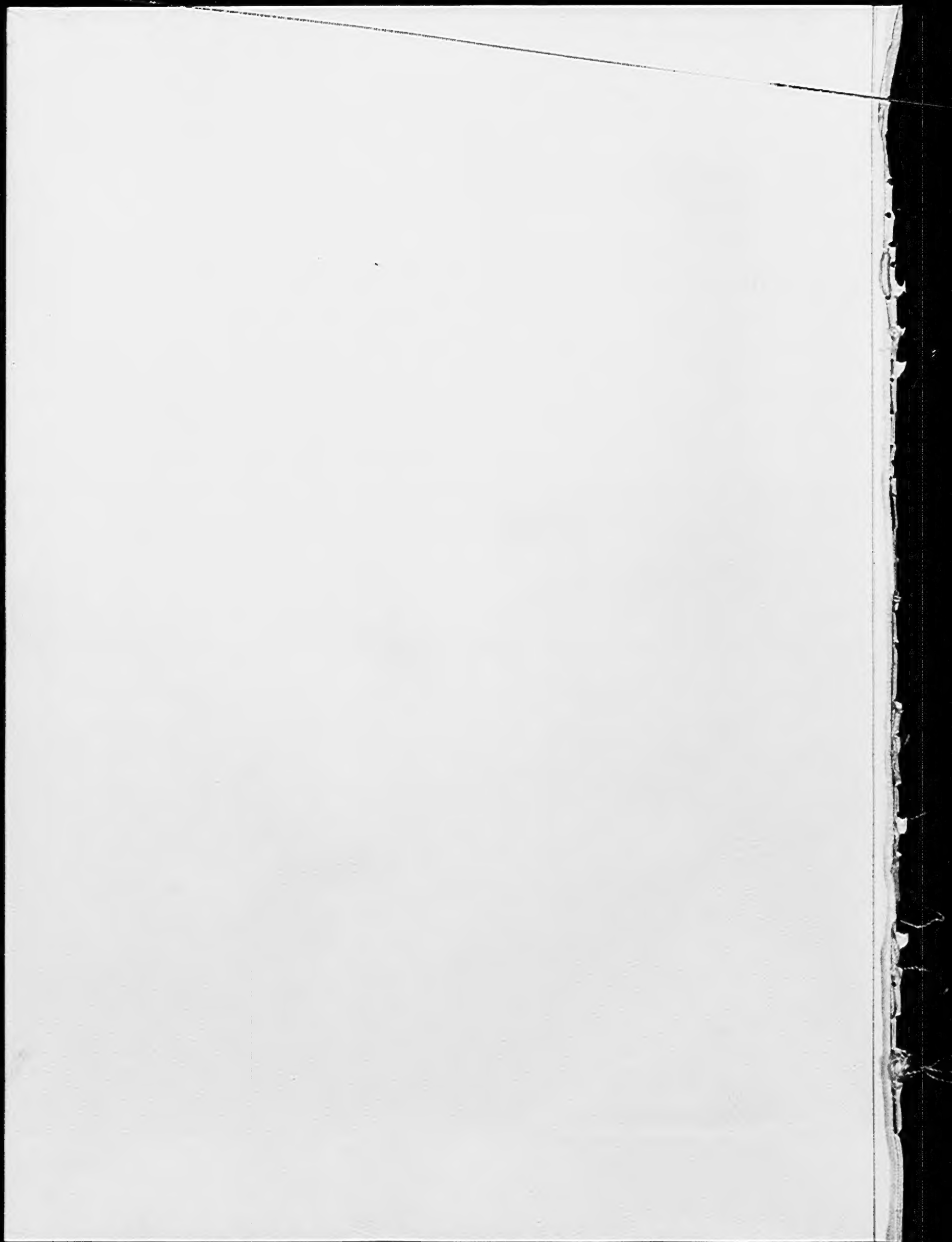
"This court is not oblivious to the fact that many of the defendant's employees are no longer with them, nor the fact that Martin-Marietta has been out of the concrete pipe business since 1964. It is not improbable that these facts may prejudice, in some degree, the defendant's defense. That board, however, has two sides. It could be argued that because the state action was started in 1963, the defendants, having heard the declaration of war, were alerted and presumably kept the required records and ascertained the desired facts from their own employees - at that time, and if any prejudice results because of a failure to do so, it is the defendant's own responsibility.....Since this case has not yet been determined on its merits.....the harsh fact of dismissal is here not authorized. The periphery of Rule 41(b) is no greater than the perimeter of federal jurisdiction."

THE TRIAL COURT'S HOLDING THAT IT HAD NO JURISDICTION
BECAUSE , IT HELD, THERE HAD BEEN NO PERSONAL SERVICE,
WAS CLEAR ERROR

The docket sheets and the file before the Court show that the Appellee filed numerous papers in this case - after which it claimed that it was not before the Court.

Appellant will not burden the court with citations on the elemental point that the conduct of Appellee in filing these papers constituted an appearance, or the similarly elemental point that one who has made an appearance is before the court for all purposes.

Suffice it to say that the ruling of the Court was clear error, and should be reversed.



CONCLUSION

In determining whether a court has abused its discretion in dismissing a suit, all of the pertinent circumstances must be considered. *Dyotherm Corp. v. Turbo Mach. Co.*, C.A. Pa. 1968, 392 F2d 146.

~~Therefore, the Court should consider that appellant has made more than~~ 25 attempts to serve appellee, has attached before judgment, has filed a new suit and obtained personal service upon appellee in New York, and has done more, in fact, than most attorneys would do to keep a case alive - so much so, that it was heard on a motion for change of venue at a time when it was, according to the trial judge, the oldest case in the court....a category of hardly any true meaning because one case is always the oldest case in the court, and if a case were to be thrown out for that reason there would soon be no cases to be tried.

The Court should also consider that the dismissal here was automatically followed in New York as *res judicata*, so that the procedural ruling here was in fact such as to bar a trial on the merits in another federal court.

In *Graziano v Pennell*, 371, F 2d 761 (1967), the U.S. Court of Appeals for the Second Circuit said:

"The New York Courts have often quoted Judge Cardozo's statement as to the forerunner of CPLR# 205 (a) that 'The statute is designed to insure to the diligent suitor the right to a hearing in court till he reach a judgment on the merits. Its broad liberal purpose is not to be frittered away by any narrow construction. The important consideration is that, by invoking judicial aid, a litigant gives timely notice to his adversary of a present purpose to maintain his rights before the courts.'"
Gaines v. City of New York, 215 N.Y. 533, 539, 109 NE 594, 596 (1915).

It would be a sad error indeed if in this and other cases the law, in rushing towards the problems of the next century, should overlook the basic human right of a litigant to a trial on the merits where he has done all that appellant here has done to obtain it.

Respectfully,
Arthur S. Curtis, for Appellant